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In the Supreme Court of the United States

OCTOBER TERM, 1993

NAEGELE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF DURHAM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a municipal ordinance that seeks to advance the interests of safety and esthetics by prohibiting outdoor commercial advertising signs, while permitting physically identical noncommercial advertising signs and numerous other signs with other types of content, is consistent with the First Amendment.

2. Whether a municipal ordinance that denies a property owner all economically beneficial use of particular pieces of property effects a "taking" within the meaning of the Fifth Amendment even though the owner has other similar property that is not affected by the ordinance.

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OPINIONS BELOW

The initial opinion of the court of appeals (App., *infra*, 22a-33a) is reported at 844 F.2d 172. The initial opinion of the district court (App., *infra*, 34a-61a) is unreported. The second opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The second opinion of the district court (App., *infra*, 3a-21a) is reported at 803 F. Supp. 1068.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1994, and a timely petition for rehearing was denied on April 5, 1994 (App., *infra*, 62a). On June 16, 1994, the Chief Justice issued an order extending the time for filing a petition for a writ of

certiorari to July 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use, without just compensation."

STATEMENT

This case involves a challenge, under the First and Fifth Amendments, to an ordinance of the City of Durham, North Carolina ("the City"), that bans all outdoor commercial advertising signs within the City's exclusive regulatory jurisdiction. In upholding the ordinance, the court of appeals sanctioned a regime that regulates speech on the basis of its content, inviting discrimination against disfavored subjects. At the same time, the court below held that the ordinance does not work a taking of property even though it concededly denies petitioner *all* economically viable use of many billboard structures and leaseholds in property. These holdings cannot be reconciled with this Court's decisions and contribute to an extraordinary confusion among the lower courts on these important issues.

1. Petitioner currently owns at least 109 billboard structures within the geographic limits of Durham's zoning jurisdiction and at least 28 additional structures elsewhere in the Durham metropolitan area.[1] These 137 structures, which display a total of 231 faces, are located on parcels of land that petitioner leases for the sole purpose of maintaining billboards. App., *infra*, 7a-8a, 11a. The billboards are substantial physical objects, with display faces of up to 672 square feet supported by steel or wood frames and anchored to the ground by concrete "footings"; the largest billboards cost

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[1] Pursuant to Rule 29.1 of the Rules of this Court, we state that the parent company of petitioner Naegele Outdoor Advertising, Inc., is Morris Communications, Inc. Naegele has no publicly held subsidiaries.

almost $40,000 apiece to erect. Petitioner's structures were built in full compliance with all applicable laws and permit requirements of the City of Durham and the State of North Carolina.

Petitioner leases the land for each of its signs separately; Durham County treats each sign as a separate piece of property for tax purposes and requires a separate permit for each. See App., *infra*, 8a. Petitioner sells space on its signs both on an individualized ("per face") basis and on a "showing" basis. When a customer purchases space on a showing basis, petitioner displays its message on a number of different billboards, selected to "show" the message to an agreed-upon percentage of the traveling public over a certain period of time. The target of a given showing typically is calculated as a percentage of the Durham metropolitan market or of a larger market including the Raleigh-Durham region. *Ibid.*

2. The City of Durham enacted the challenged ordinance on September 4, 1984, and amended it on June 19, 1985 (jointly referred to hereinafter as "the Ordinance"). (The Ordinance in its current form is reprinted at App., *infra*, 63a-92a.) As originally enacted, the Ordinance divided outdoor advertising signs into two categories: "on-premises" signs, defined as signs that "advertise[] or direct[] attention to a business, commodity, or service conducted, offered, or sold on the premises, or direct[] attention to the business or activity conducted on the premises"; and "off-premises" signs, defined as those that "direct attention to a business, commodity, service or entertainment not conducted, sold or offered on the premises where the sign is located, or which business, commodity, service or entertainment forms only minor and incidental activity upon the premises where the sign is displayed." *Id.* at 71a. Petitioner's billboards are "off-premises" signs.

The Ordinance prohibits *all* off-premises advertising signs within the City of Durham except those subject to state or federal regulation.[2] The Ordinance originally provided that, as of March

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[2] The exception includes signs located along interstate or federally aided primary highways. Federal and North Carolina statutes prevent the City from banning such signs without paying just compensation to sign

4, 1990, all non-conforming signs had to be removed without the payment of any compensation. The "enforcement date" was later changed to September 4, 1990, and has been further stayed pending the conclusion of this litigation. Durham, N.C. Ordinance No. 7948 (Nov. 20, 1989) (amending Durham City, N.C. Code § 24-14.0). The 5½-year period between the enactment and enforcement dates of the Ordinance has been referred to as the "amortization period." When it goes into effect, the Ordinance will apply to approximately 65 of petitioner's signs (App., *infra*, 11a); the remainder of petitioner's 109 signs in Durham are exempt because they are subject to state or federal regulation and cannot be banned without payment of statutorily required compensation.[3]

Shortly after petitioner brought this suit the City amended the Ordinance to create another category of sign: the "noncommercial" sign, defined as "[a] sign which is not an on-premises or off-premises sign and which carries no message, statement, or expression related to the commercial interests of the sign owner, lessee, author or other person responsible for the sign message. Noncommercial signs include but are not limited to: signs expressing political or religious views; [and] signs of nonprofit organizations, related to their tax-exempt purposes." App., *infra*, 71a. Noncommercial signs are not covered by the ban on advertising signs. The parties have stipulated, however, that "no economically viable market exists for non-commercial advertising on the structures that otherwise must be removed to comply with the ordinance." *Id.* at 11a. The Ordinance thus prevents petitioner from making any economically beneficial use of the billboards to which it applies.

3. Petitioner brought this lawsuit in June 1985, contending that the Ordinance violated its rights under the First, Fifth, and

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owners. 23 U.S.C. § 131(g); N.C. Gen. Stat. § 136-131.1.

[3] The district court indicated that 105 or 106 sign faces on 64 to 70 sign structures would be affected by the Ordinance. App., *infra*, 11a. The parties' stipulations upon which the district court relied indicate that the number of affected signs is somewhere between 57 and 72. The precise number is not material to the legal issues presented here.

Fourteenth Amendments. The district court granted the City's motion for summary judgment on all claims. App., *infra*, 34a-61a. The court of appeals affirmed on the First Amendment issue. Relying on the plurality opinion in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 503-516 (1981), it held that a billboard regulation is constitutional if it does not "prefer[] commercial over noncommercial advertising." App., *infra*, 23a. The court went on to conclude that the City's asserted interest in esthetics was a sufficient justification for the Ordinance. *Id.* at 23a-24a.

The court of appeals remanded for further proceedings on the takings issue, however, finding that there were disputed questions of material fact. App., *infra*, 26a-33a. The court offered several observations to guide the remand. Because the determination whether a taking occurred turns on the extent to which the regulation at issue diminishes the value of the affected property, the court of appeals held that the district court should first determine "the appropriate unit of [petitioner's] property" for use as the "denominator" in the takings inquiry. *Id.* at 27a. Relying on *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), the court opined that "the unit is *not* composed of the affected billboards, which * * * do not constitute a separate segment of property for taking purposes" (App., *infra*, 28a (emphasis added)); instead, the court indicated that the appropriate unit of property is some larger *set* of signs, the contours of which "depends largely on the scope of [petitioner's] sharing contracts" (by which the court meant contracts providing for the display of advertising on a "showing" basis). *Id.* at 32a; see *id.* at 29a.[4] After determining the unit of property to use in the inquiry, the district court was then to assess whether the Ordinance "denied [petitioner] economically viable use of [that] unit." *Id.* at 29a. In making that determination, the court of appeals explained that the

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[4] The court of appeals explained that "[i]f the sharing market is confined to the triangle area of North Carolina, it would appear that the appropriate unit of property is [petitioner's] business in this area. * * * If [petitioner] advertises cigarettes or any other product through sharing contracts that are nationwide or in other broadly defined markets, the unit of its affected property may be larger than the business it conducts in the triangle area." App., *infra*, 29a.

amortization period was relevant because, if "reasonable" (*id.* at 32a), it would "enabl[e] [petitioner] to recoup or minimize [its] loss." *Id.* at 30a.

On remand, the district court recognized that "the Durham ordinance affects *multiple properties* owned by one entity." App., *infra*, 8a (emphasis added). But following the court of appeals' direction that the appropriate unit of property for takings purposes "'is not composed of the affected billboards,'" the district court concluded that the separate properties owned by petitioner in the "Durham metro market" should be aggregated into a larger, *single* unit of property. *Id.* at 9a. The district court noted the crucial importance of this aggregation to the outcome of the case (*ibid.*):

> If [petitioner] owned only one sign, and the use of that sign were prohibited by the Durham ordinance, the court would, of course, look to that one sign as the unit of property. But since the reality of [petitioner's] business is that [petitioner] combines the leasehold interests in its signs into a unit in selling outdoor advertising in the Durham area, it follows that the unit of property to be considered for takings purposes is the combined group of Durham metro area signs.

Having made the critical determination that the relevant unit of property is petitioner's "business" in the Durham metropolitan area, the district court proceeded to make findings about the economic impact of the Ordinance on that business. First, the court found that persons with noncommercial messages generally will not place them on billboards unless "the advertising is free or very low cost." App., *infra*, 11a. Accordingly, the court adopted the parties' stipulation that there was "no economically viable market" for non-commercial advertising. *Ibid.* Because customers generally will not purchase space for noncommercial messages, and because signs demolished to comply with the Ordinance will have no salvage value (*id.* at 11, 13), the court concluded that "[a]ll * * * sign[s] * * * affected by the ordinance are economically useless * * *." *Id.* at 11. The court likewise found that petitioner's leaseholds on land had value only as sites for billboard advertising. *Id.* at 12.

Second, the district court found that the replacement cost of the affected signs was $428,136 and estimated that their original

construction cost was $130,435. App., *infra*, 12a. The court also found that many of the signs had useful lives that would run until well after the expiration of the 5½-year amortization period. *Id.* at 12a, 20a. But because the court determined that petitioner's total income during that period exceeded the replacement cost of the signs, it held that the amortization period was reasonable. *Id.* at 17a.

Finally, the district court evaluated the impact of the Ordinance "on the *entire set* of [petitioner's] property interests." App., *infra*, 18a (emphasis added). The court concluded that because more than half of petitioner's signs in the "Durham metro market" would remain unaffected (since they were either legally or economically out of Durham's reach), and in light of the "benefit conferred" on petitioner "by the grant of an amortization period," the Ordinance did not effect a taking. *Ibid.* The court acknowledged that "[t]he ordinance destroys all economically beneficial use of [many] signs at the expiration of the amortization period" but concluded that "there is no evidence that [petitioner] will not be able to realize a reasonable return on its remaining signs." *Ibid.*

The court of appeals affirmed. In a brief order directed only to the takings issue, the court of appeals rejected petitioner's arguments "for reasons adequately stated by the district court in its opinion." App., *infra*, 2a. The First Amendment issue was not addressed and apparently was not considered.[5]

REASONS FOR GRANTING THE PETITION

The regulation of outdoor commercial advertising and other signage involves recurring issues of great theoretical and practical importance that reach beyond sign law alone. The perceived public

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[5] After briefing but before oral argument in the court of appeals, this Court decided *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), which called into serious question the First Amendment ruling in the original appeal. Accordingly, on April 7, 1993, petitioner moved for permission to submit supplemental briefing with respect to the First Amendment issue in light of *Discovery Network*. The court of appeals summarily denied that motion on April 29, 1993.

interest in esthetics and safety has prompted the enactment of sign regulations at the federal level (23 U.S.C. § 131 *et seq.*) and by state and local governments across the country. But tension between those regulations and the requirements of the First and Fifth Amendments has led to an enormous volume of continuing and inconclusive litigation.[6] That is not surprising: the Court's leading precedents under those Amendments have been characterized as, respectively, "a virtual Tower of Babel" (*Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting)), and "inconsistent" with one another. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992). The subject of outdoor advertising regulation accordingly is one that cries out for further guidance from this Court.

This case is an appropriate vehicle for providing that guidance. The court of appeals' holding on the First Amendment sanctions a type of content-based regulation of speech that, as we explain

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[6] A partial listing of the more recent decisions includes *Dimmitt* v. *City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993); *Gilleo* v. *City of Ladue*, 986 F.2d 1180 (8th Cir. 1993), aff'd, 114 S. Ct. 2038 (1994); *National Advertising Co.* v. *City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992); *National Advertising Co.* v. *Town of Niagara*, 942 F.2d 145 (2d Cir. 1991); *National Advertising Co.* v. *City and County of Denver*, 912 F.2d 405 (10th Cir. 1990); *National Advertising Co.* v. *Town of Babylon*, 900 F.2d 551 (2d Cir.), cert. denied, 498 U.S. 852 (1990); *Georgia Outdoor Advertising, Inc.* v. *Waynesville*, 900 F.2d 783 (4th Cir. 1990); *Ackerley Communications of Mass., Inc.* v. *City of Somerville*, 878 F.2d 513 (1st Cir. 1989); *National Advertising Co.* v. *City of Orange*, 861 F.2d 246 (9th Cir. 1988); *Rzadkowolski* v. *Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988); *Georgia Outdoor Advertising, Inc.* v. *City of Waynesville*, 833 F.2d 43 (4th Cir. 1987); *Lindsay* v. *City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988); *Wheeler* v. *Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988); *Major Media of the Southeast* v. *City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); *National Advertising Co.* v. *City of Rolling Meadows*, 789 F.2d 571 (7th Cir. 1986); *Ackerley Communications, Inc.* v. *City of Salem*, 752 F.2d 1394 (9th Cir.), cert. denied, 472 U.S. 1028 (1985).

below, this Court has recently condemned. And the court of appeals' interpretation of the Fifth Amendment will render the Takings Clause largely nugatory in virtually every case involving the ownership of multiple parcels of property dedicated in part to a related use — thus encouraging municipalities across the nation to enact legislation that takes valuable private property for public use without the payment of compensation. Further consideration of the case by this Court therefore is in order.

I. THE DURHAM ORDINANCE RAISES DIFFICULT AND IMPORTANT FIRST AMENDMENT ISSUES

The court of appeals' First Amendment ruling arises in an area of the law that has been marked by extraordinary confusion. The Court has addressed the application of the First Amendment to outdoor commercial advertising only once, in its 13-year-old decision in *Metromedia*.[7] The Fourth Circuit therefore relied almost exclusively on the *Metromedia* plurality opinion, holding that a billboard regulation is constitutional so long as it does not prefer commercial over noncommercial advertising — even if it instead prefers noncommercial over commercial speech. But while it is the seminal decision in this area, the meaning of *Metromedia* has been the source of unending disagreement. The Court in that case produced five largely irreconcilable opinions, none of which commanded support from a majority of the Justices; the result, in the words of then-Justice Rehnquist, was "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569 (Rehnquist, J., dissenting). And the problem has been greatly compounded by the Court's recent decision in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), which seems clearly at odds with the conclusions of the *Metromedia* plurality.

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[7] In fact, *Metromedia* is one of only two cases in which the Court has considered regulations of commercial speech designed to combat harms unrelated to the commercial content of the speech. See Note, *The Supreme Court — Leading Cases*, 107 Harv. L. Rev. 144, 229 (1993). The other is *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

As we will explain, the court of appeals' holding in this case cannot be reconciled with *Discovery Network*. The decision below also contributes to the continuing disagreement in the lower courts about the meaning of *Metromedia*. And perhaps most important, confusion and uncertainty is "a genuine misfortune" in an area of the law "where city planning commissions and zoning boards must regularly confront constitutional claims" of the sort presented here. *Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting).

1. *Metromedia* considered the constitutionality of a San Diego ordinance regulating outdoor advertising signs. To advance the interests of safety and esthetics, the ordinance established a general prohibition on such signs, subject to several significant exceptions: it permitted commercial on-site signs, and it permitted certain specified categories of noncommercial off-site signs. See 453 U.S. at 493-495. The San Diego ordinance thus made distinctions of three types: *within* the category of commercial speech (by permitting on-site but not off-site commercial signs); *within* the category of noncommercial speech (by permitting only those types of off-site noncommercial signs that were expressly authorized); and *between* the categories of commercial and noncommercial speech (by permitting on-site commercial, but not noncommercial, signs).

A plurality of four Justices upheld the constitutionality of the distinction drawn by the ordinance within the category of commercial speech (see 453 U.S. at 508-512), concluding that a city is permitted by the First Amendment "to value one kind of commercial speech — onsite advertising — more than another kind of commercial speech — offsite advertising." *Id.* at 512.[8] But the plurality went on to find two aspects of the ordinance unconstitutional. Because it believed that "commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech," the plurality reasoned that the city could not permit on-site commercial signs while prohibiting noncommercial speech on the same signs; it therefore concluded that "[i]nsofar as the city tolerates billboards at all, it cannot choose

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[8] Justice Stevens joined this portion of the plurality's opinion. See 453 U.S. at 541 (Stevens, J., dissenting in part).

to limit their content to commercial messages." *Id.* at 513. The plurality also found that the city could not make distinctions within the category of noncommercial speech, explaining that "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Id.* at 515.

The decisive votes in *Metromedia* were cast by Justices Brennan and Blackmun, who concurred in the result. 453 U.S. at 521-540. These Justices, however, used "a method of analyzing [the ordinance's] constitutionality very different from the plurality's." *Rappa* v. *New Castle County*, 18 F.3d 1043, 1058 (3d Cir. 1994). Because the ordinance would effectively eliminate billboards as a medium of communication in the city, the concurring Justices reasoned that the ordinance could be upheld only if it was narrowly drawn to directly further a substantial state interest. 453 U.S. at 528. They found that the ordinance failed this test because the city had neither established "that billboards actually impair traffic safety in San Diego" nor "show[n] that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego." *Id.* at 528, 530. The concurring Justices expressly disagreed "with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional" (*id.* at 536), explaining that the determination whether given speech is commercial or noncommercial "would entail a substantial exercise of discretion by a city's official [and therefore] presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." *Id.* at 536-537.

The three dissenting Justices, each of whom wrote separately, also rejected the plurality's reasoning. Justice Stevens found it unnecessary to reach the question whether the ordinance preferred commercial over noncommercial speech (453 U.S. at 544-548), going on to reject the plurality's conclusion that distinctions within the category of noncommercial speech rendered the ordinance unconstitutional. *Id.* at 549. Chief Justice Burger concluded that neither the distinctions within the category of permissible noncommercial signs nor the preference of commercial over noncommercial signs invalidated the ordinance. *Id.* at 564, 567. And then-Justice Rehnquist agreed that the exceptions in the

ordinance were not "the types which render [it] unconstitutional." *Id.* at 570.

Not surprisingly, this welter of inconsistent opinions has proven extraordinarily perplexing to lower courts — an effect that has been especially pronounced because "the plurality and concurrence took such markedly different approaches * * * that there is no common denominator between them." *Rappa*, 18 F.3d at 1058. See generally *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2041-2043 (1994). From the time it was decided, commentators have complained that *Metromedia* "accomplished only a further muddying of the waters." Comment, *Metromedia, Inc. v. City of San Diego*, 11 Hofstra L. Rev. 371, 373 (1982) (footnote omitted). See, *e.g.*, Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 Mich. L. Rev. 2482, 2488 (1990) ("*Metromedia* settled very little in the law of billboards"); Comment, *The Federal Highway Beautification Act After* Metromedia, 35 Emory L.J. 419, 421 (1986) (*Metromedia* "cannot produce a workable formula"). This confusion has not diminished with time. Indeed, the Third Circuit concluded earlier this year that the decisions in *Metromedia* "do not establish a governing standard for future cases." *Rappa*, 18 F.3d at 1060.

The predictable result is that "[l]ower court decisions since *Metromedia* have been anything but uniform." Note, *supra*, 88 Mich. L. Rev. at 2488. Some courts have invalidated ordinances that make any distinction within the category of noncommercial signs (see, *e.g.*, *Town of Babylon*, 900 F.2d at 557); others have not (see *Messer* v. *City of Douglasville*, 975 F.2d 1505, 1511-1513 (11th Cir. 1992), cert. denied, 113 S. Ct. 2395 (1993)). See generally *Rappa*, 18 F.3d at 1056. Some courts, such as the Fourth Circuit in this case, have upheld any ordinance that does not prefer commercial to noncommercial signs. See Pet. App. 23a.[9]

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[9] Courts have differed, however, on what it means to prefer commercial to noncommercial signs. The Sixth Circuit has held that a regulation is constitutional if it limits any establishment, whether commercial or noncommercial, to signs relating to on-site activity. See *Rzadkowolski* v. *Village of Lake Orion*, 845 F.2d at 654-655; *Wheeler* v. *Commissioner of Highways*, 822 F.2d at 592-594. Other courts have

The Third Circuit, in contrast, has held that content-based exceptions to a general ban on signs must be "significantly related to the particular area in which the sign is viewed — for example, a sign identifying the property on which it sits." *Rappa*, 18 F.3d at 1047. The Durham Ordinance, which permits the placement of noncommercial signs addressing any subject anywhere in the City, would not survive application of the Third Circuit's test.

2. While matters were difficult enough under *Metromedia*, the confusion has been greatly compounded by the Court's recent decision in *Discovery Network*, which seems irreconcilable with the *Metromedia* plurality opinion. In *Discovery Network*, the Court invalidated a Cincinnati regulation that, to further the City's interests in safety and esthetics, prohibited newsracks used to distribute commercial fliers, while permitting newspaper newsracks. See 113 S. Ct. at 1508-1509. Observing that the commercial newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks" (*id.* at 1514), the Court held (*id.* at 1516):

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills."

The Court also concluded that there was an insufficient "fit" between the city's means and ends because its approach would leave in place a large percentage of Cincinnati's many newsracks. See *id.* at 1510. The Court rejected the City's argument that *any* diminution in the number of newsracks directly advanced the interests of safety and esthetics, finding that assertion "an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks." *Id.* at 1511.

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concluded that the sign owner must be free to place any noncommercial message wherever a commercial sign is permissible. See, *e.g.*, *Town of Babylon*, 900 F.2d at 556-557.

Explicit in this analysis is a rejection of the proposition that a regulation may discriminate against commercial speech on the theory that such speech has a "low value." See 113 S. Ct. at 1511. As the Court explained, that view, which was the premise of the city's argument in *Discovery Network*, "attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech." *Ibid.* Instead, the Court suggested that commercial speech may be subjected to disparate treatment principally when the regulation is designed to "prevent[] *commercial harms* by regulating the information distributed" (*id.* at 1515 (emphasis added)), a rationale that "has little, if any, application to a regulation of [the speech's] distribution practices." *Id.* at 1515 n.21. And echoing the concern of the concurring Justices in *Metromedia*, the Court spent considerable time describing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category" (*id.* at 1511; see *id.* at 1511-1513) — and explaining that this difficulty "carries with it the potential for invidious discrimination of disfavored subjects." *Id.* at 1514 n.19.[10] Cf. *City of Ladue*, 114 S. Ct. at 2045; *id.* at 2047 (O'Connor, J., concurring).

Discovery Network is in obvious tension with the *Metromedia* plurality's conclusion that noncommercial speech is constitutionally

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[10] This concern is not at all fanciful. Consider a recent advertisement placed in major newspapers by the R.J. Reynolds Tobacco Co., which carries a picture of the company's chairman smoking a cigarette, the headline "We Do Not 'Spike' Our Cigarettes With Nicotine," and the statement that "[w]e are committed to bringing the best quality products that we can make to our customers and we will continue to do so." Wall St. J., June 8, 1994, at A15. Is this advertisement commercial speech because it praises a commercial product and seems plainly designed to foster good will towards the company, or is it noncommercial speech because it addresses a significant issue of great public currency? It is doubtful that such a distinction can meaningfully be made. See Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 638-648 (1990). And allowing a state official to answer that question — and to bar speech if it is determined to fall on the wrong side of the line — invites censorship of disfavored messages.

favored over commercial speech. Indeed, although the Court in *Discovery Network* made what has been described as a "half-hearted attempt to distinguish *Metromedia*" (Note, *supra*, 107 Harv. L. Rev. at 230 n.41), the dissenters in *Discovery Network* read the Court's opinion to "suggest[] that commercial speech is only subject to lesser protection when it is being regulated because of its content (or adverse effects stemming therefrom)." 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting). Other courts also have observed that the *Metromedia* plurality's seeming conclusion that noncommercial may be favored over commercial speech "has been significantly called into question by * * * *Discovery Network*." *Rappa*, 18 F.3d at 1056 n.21. See *id.* at 1065 n.36.

3. This tension is well-illustrated by the circumstances of this case. The holding below is a plausible application of the *Metromedia* plurality's analysis. But that holding — and the Durham Ordinance — plainly cannot survive application of the principle recognized in *Discovery Network*. The Ordinance permits off-premise *noncommercial* signs while prohibiting identical signs that carry a *commercial* message, just as the Cincinnati policy at issue in *Discovery Network* permitted newspaper newsracks while banning newsracks distributing commercial fliers. As in *Discovery Network*, the municipal policy here is designed to advance interests in safety and esthetics; as in *Discovery Network*, "[t]here is no claim in this case that there is anything unlawful or misleading about" the prohibited commercial speech. 113 S. Ct. at 1509. And as in *Discovery Network*, "the distinction [between signs carrying commercial and noncommercial messages] bears no relationship *whatsoever* to the particular interests that the city has asserted," because there has been no showing that there is *any* functional difference between commercial and non-commercial signs. *Id.* at 1514 (emphasis in original). As it "was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of [off-site commercial signs] as the means chosen to serve those interests" (*id.* at 1510), the Ordinance should have been invalidated.[11]

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[11] The conflict between the decision below and *Discovery Network* is

4. Against this background, the instant case offers a timely and appropriate vehicle to clarify the uncertainties and inconsistencies that characterize this important area of the law. The court of appeals' holding sanctions the very sort of content-based discrimination that this Court has rejected. And more broadly, the massive confusion in this area has made it difficult both for courts to resolve constitutional challenges and for governments to know how they may regulate outdoor advertising. Shortly after *Metromedia* was decided, it was observed that the decision "make[s] it almost impossible to say with confidence exactly what restrictions a municipality may impose upon billboard advertising." Young, *Billboard Advertising Decision is Indecisive*, 67 A.B.A.J. 1350 (Oct. 1981). And it remains the case today that "the ability of a legislature to rely on the decision when attempting to enact constitutional legislation is relatively small." *Rappa*, 18 F.3d at 1060 n.25. See Note, *supra*, 35 Emory L.J. at 421 (*Metromedia* "call[ed] into question innumerable billboard laws without really giving any clear guidance as to how those laws could be rewritten

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demonstrated by the Ninth Circuit's recent decision in *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993). That case involved a challenge to municipal sign codes that significantly restricted permissible signs. While the codes contained so-called "substitution provisions" that permitted noncommercial messages to be substituted for commercial ones, such substitution was permitted only on "signs that the sign code would already allow." *Id.* at 611. The Ninth Circuit held that

> [t]he codes do not discriminate between commercial and noncommercial speech and thus do not run afoul of the principle enunciated in *Discovery Network*. 113 S. Ct. at 1516. The codes distinguish among types of commercial speech — onsite and offsite — but as between commercial and noncommercial speech the codes are neutral. Apart from onsite signs at noncommercial establishments, every sign * * * can carry either a commercial or a noncommercial message.

Ibid. Thus, the Ninth Circuit's view is that a sign code, like Durham's, that is not neutral as between commercial and noncommercial speech is invalid under *Discovery Network*. The decision below cannot be reconciled with *Outdoor Systems*.

in order to conform with the Court's holding"). This incoherence in the governing law places local governments in an intolerable position.

5. If the Court concludes that plenary review is not warranted, it nevertheless should grant the petition, vacate the decision below, and remand the case for reconsideration in light of *Discovery Network*. The court of appeals' decision on the First Amendment issue predated *Discovery Network*; petitioner did not seek review of the decision at the time because it was interlocutory. See *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (per curiam); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 195-196 (7th ed. 1993). The court of appeals has since refused even to consider the relevance of *Discovery Network* to its analysis, denying petitioner's request during the pendency of the second appeal in this case to submit supplemental briefing on the First Amendment issue. See note 5, *supra*. Because this Court has issued a decision that calls into question the validity of the court of appeals' First Amendment holding, it is entirely appropriate to direct the court of appeals to reconsider that holding. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *supra*, at 249. Petitioner is entitled, at some point and in some court, to have the Ordinance judged against the standards announced in *Discovery Network*.

II. THE DURHAM ORDINANCE WILL WORK A TAKING OF PROPERTY

Even if enactment of the Ordinance was within the City's power under the First Amendment, a second issue in this case also deserves the Court's consideration: whether the Ordinance would work a taking of petitioner's property requiring the payment of just compensation. The courts below recognized that "[t]he ordinance destroys *all* economically beneficial use" of the affected signs (App., *infra*, 18a (emphasis added)) and renders petitioner's leases valueless as well. But those courts nevertheless were able to hold that no taking occurred by the simple expedient of aggregating all of petitioner's signs and leaseholds in the Durham metropolitan area into a larger unit, which the courts treated as "the denominator in [the] 'deprivation' fraction." *Lucas*, 112 S. Ct. at 2894 n.7. This definition of the unit of property dictated the outcome of the takings

analysis.[12] The issue raised by this holding — how to determine the appropriate unit of property against which to conduct the takings inquiry — involves what the Court has noted is a recurring and "difficult question." *Ibid.*

As we explain below, the approach taken by the lower courts in this case cannot be squared with this Court's decisions. More fundamentally, it is plain that this is an area in which further guidance from the Court is essential. The Court itself recently acknowledged that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court" about when a compensable taking occurs. *Lucas*, 112 S. Ct. at 2894 n.7. In the absence of clearer direction from this Court, the Fourth Circuit's holding will constitute a blueprint for evasion of the requirements of the Takings Clause in many cases in which the takings claimant owns or leases more than a single parcel of property. That result would make compliance with the Clause no "more than an exercise of cleverness and imagination" on the part of government lawyers. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987).

1. The background principle against which this case should be decided is familiar and well-settled: "'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Lucas*, 112 S. Ct. at 2893, quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). See *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316-317 (1987); *id.* at 328 (Stevens, J., dissenting). In particular, the Court has held regulatory action to be "compensable without case-specific inquiry" when the "regulation denies all economically beneficial or productive use" of the affected property. *Lucas*, 112 S. Ct. at 2893.

As the Court has noted, however, application of that "categorical" rule (*Lucas*, 112 S. Ct. at 2893) raises vexing problems. In deciding whether property has lost much or all of its beneficial use,

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[12] The district court was "not unmindful of the significance of its determination that each individual sign does not constitute a separate unit of property. If it did, the *Lucas* inquiry into the nature of [petitioner's] title could be determinative." App., *infra*, 21a n.7.

a court necessarily must first determine "how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (citation omitted). Yet the "'deprivation of all economically feasible use' rule * * * does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 112 S. Ct. at 2894 n.7.

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether [the Court] would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Ibid. See *Loveladies Harbor, Inc.* v. *United States*, No. 91-5050, 1994 U.S. App. LEXIS 14768 (Fed. Cir. June 15, 1994), at *32 (noting the "array of possible denominators").

Whatever the uncertainties on this point, however, we submit that the approach taken by the courts below — which aggregated many *separate* pieces of property (consisting of more than 130 discrete signs and leaseholds on more than 130 discrete parcels of land) into a *single* unit for purposes of the takings inquiry — is indefensible. In *Lucas*, the Court described as "an extreme — and, we think, unsupportable — view of the relevant calculus" the lower court decision in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), which resolved a takings claim by examining "the diminution in a particular parcel's value produced by a municipal ordinance in light of the *total* value of the taking claimant's other holdings in the vicinity." 112 S. Ct. at 2894 n.7. That is precisely what the Fourth Circuit did here. And if (as in *Penn Central*) commonly owned buildings located on *adjacent* parcels are separate units of property for Takings Clause purposes,[13] 137 commonly

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[13] *Penn Central* involved the impact of New York City's Landmarks Preservation Law on Grand Central Terminal. The New York Court of Appeals rejected the takings claimant's request for compensation, reasoning that "plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings, could lose considerable value

owned but physically separate structures, sitting on separately leased parcels of land scattered throughout four counties, must also be separate units.

2. The conclusion that separate pieces of property cannot be combined when conducting a takings inquiry is firmly rooted in this Court's doctrine. As Chief Justice Rehnquist has explained, the Court has

> evaluated takings claims by reference to the unit of property *defined by state law*. * * * Reliance on state law is necessitated by the fact that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"

Keystone, 480 U.S. at 518-519 (Rehnquist, C.J., dissenting) (emphasis added), quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), in turn quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).[14] Indeed, since property interests are created and defined by state law, it is difficult to see how a court could ascertain the appropriate "unit" of property for the takings inquiry without reference to that law.

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and deprive plaintiffs of much income, were the terminal not in operation. Some of this income must, realistically, be imparted to the terminal." *Penn Central Transp. Co.* v. *New York City*, 366 N.E.2d 1271, 1276 (1977). While this Court affirmed the state court's judgment, it pointedly did not endorse the view that separate parcels of property may be aggregated for the takings inquiry. Instead, the Court treated the terminal itself, and only the terminal, as the relevant unit of property, notwithstanding the clear economic interrelation among the various New York buildings (two of which were immediately adjacent to the terminal) owned by the claimant. See 438 U.S. at 115.

[14] The majority in *Keystone* did not take issue with this analysis; instead, it appeared to rest its denial of the takings claim in that case on its finding that the regulation affected a "broader * * * segment of property presumably recognized by state law." *Keystone*, 480 U.S. at 519 (Rehnquist, C.J., dissenting).

That understanding was expressly confirmed by the Court in *Lucas*. There, the Court indicated that "[t]he answer to th[e] difficult question" of how to discern "the 'property interest' against which [a] loss of value is to be measured" lies in "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." 112 S. Ct. at 2894 n.7. Similarly, in concluding that compensation is *not* required when a regulation is enacted that merely codifies pre-existing state nuisance law, the Court in *Lucas* relied on its "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments." 112 S. Ct. at 2901 (citation omitted).

Viewed from the perspective of state law, there can be "no question" that petitioner's individual signs and leases are "identifiable and separable property interest[s]" (*Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting)), and the courts below did not suggest otherwise. A leasehold is a recognized property interest under North Carolina law: "It is well established that a tenant for years under a written lease is an owner of property in the constitutional sense * * * ." *City of Durham* v. *Eastern Realty Co.*, 155 S.E.2d 231, 234 (N.C. 1967) (internal quotation marks omitted). See *Kavanau Real Estate Trust* v. *Debnam*, 254 S.E.2d 638, 640 (N.C. Ct. App. 1979) ("[t]he rule in this State appears to be well settled that a leasehold interest in real property is a chattel real"), aff'd, 263 S.E. 595 (N.C. 1980). And as a matter of federal constitutional law, "[i]t has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken * * * ." *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295, 303 (1976) (footnote omitted).

As for the signs themselves, each one must be the subject of a separate permit, for which a separate fee is paid. Durham City, N.C. Code § 24-14.D.2, 5. Petitioner reports the value of each sign separately to Durham County for property tax purposes. The State pays compensation when it condemns an individual sign (N.C. Gen. Stat. § 136-131, 132; *id.* § 113A-167); if the State does not

commence condemnation procedures voluntarily, the owner of the sign may initiate an action for inverse condemnation. N.C. Gen. Stat. § 136-111. In either case, when the sign is located on leased land, the billboard owner is compensated both for the fair market value of his leasehold interest and the economic value of the sign. The North Carolina courts thus have recognized that a single "'outdoor advertising sign * * *' satisfies the requirement [for maintaining an inverse condemnation action] that the taking be of 'private property.'" *Schloss Outdoor Advertising Co.* v. *City of Charlotte*, 272 S.E.2d 920, 922 (N.C. Ct. App. 1980).[15]

The conclusion that each sign and leasehold is a separate unit of property is confirmed by consideration of the physical and practical realities in outdoor advertising cases. Each billboard is a substantial structure set in concrete "footings" that resemble the foundations of a house. Many are equipped with walkways and railings and are wired for electricity. The 65 signs affected by the Ordinance (and, indeed, all of petitioner's signs) are physically independent of each other. The leased parcels on which the signs sit are scattered throughout the City, and each is the subject of a separate lease agreement; the signs in the "Durham metro area," lumped together by the courts below, are located in four different counties. And the signs cannot, as a practical matter, be moved from one location to another. App., *infra*, 13a. The signs and leaseholds therefore plainly are independent and free-standing units of property.

3. The courts below nevertheless concluded that petitioner's many properties in the Durham area could be aggregated on the authority of this Court's decision in *Keystone*. That case involved Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, which prohibits coal mining that causes subsidence damage to certain surface structures. See 480 U.S. at 476-477. In practice, the Act required the takings claimants in *Keystone*, operators of coal mines, to provide for support of the surface by leaving in

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[15] The Court has viewed such legislative recognition of the need to pay compensation for the imposition of restrictions on property as highly instructive to the takings inquiry. See *Lucas*, 112 S. Ct. at 2895; *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1002-1003 & n.8 (1984).

place something less than 2% of the coal in the affected mines. See *id.* at 496, 498. The claimants argued that the Act worked takings of two aspects of their property: the coal left in place, which they owned but could not mine (see *id.* at 498-499); and the so-called "support estate," which consisted of the right to remove support from the surface of a given piece of land. See *id.* at 478-479, 500-501. Pennsylvania law formally viewed the support estate "as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate." *Id.* at 500. This Court rejected the takings claim in *Keystone*. The courts below relied almost exclusively on that holding, reasoning that "the affected billboards, * * * like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes." App., *infra*, 28a; see *id.* at 9a.

That analysis, however, rests on a plain misreading of *Keystone* and threatens to convert the Court's narrow (and closely divided) holding in that case into a vehicle for destroying regulatory takings claims whenever the claimant owns two or more economically related pieces of property. In fact, the Court's reasoning in *Keystone* offers no support for the decisions below. In finding that the coal left in place (which was simply a small portion of a continuous vein) had not been taken, the Court in *Keystone* analogized the Act to a zoning requirement "that a building occupy no more than a specified percentage of the lot on which it is located"; viewed in this light, there was "no basis for treating the less than 2% of petitioners' coal [that would be left unmined] as a separate parcel of property." 480 U.S. at 498. But that conclusion has no applicability whatsoever to the Durham Ordinance, which renders physically and legally *discrete* properties wholly valueless.

As for the support estate, the Court concluded that "our takings jurisprudence forecloses reliance on such legalistic distinctions *within* a bundle of property rights." 480 U.S. at 500 (emphasis added). The Court explained that "as a practical matter the support estate is always owned by either the owner of the surface or the owner of the minerals" (*ibid.*) and that, "in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated." *Id.* at 501. As a consequence, "[i]ts value is merely a part of the

entire bundle of rights possessed by the owner of either the coal or the surface." *Ibid.* This holding turned on application of the settled rule that "'[t]aking' jurisprudence does not divide a *single* parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130-131 (emphasis added). Accord *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). See *Keystone*, 480 U.S. at 497, 498, 500 (relying on *Penn Central* and *Allard*).

Again, that analysis has no bearing here. It is one thing to say that the air rights over Grand Central Terminal (see 438 U.S. at 130-131) or the support estate that is physically integrated with a small portion of a vein of coal are "strands" of a larger and constitutionally indivisible bundle of interests. It is quite another to apply that label to *discrete* leaseholds and free-standing structures that have all of the traditional accoutrements of a complete property interest. As to each of these parcels of property, the Durham Ordinance has "extinguish[ed] the 'full bundle' of rights." *Keystone*, 480 U.S. at 516 (Rehnquist, C.J., dissenting).

4. In reaching a contrary conclusion, the Fourth Circuit reasoned that the billboards and leaseholds should not be considered individually because petitioner typically markets advertising space on a number of signs as a package. App., *infra*, 28a-29a. The district court implemented that holding on remand, opining that "since the reality of [petitioner's] business is that [petitioner] combines the leasehold interests in its signs into a unit in selling outdoor advertising in the Durham area, it follows that the unit of property to be considered for takings purposes is the combined group of Durham metro area signs." *Id.* at 9a. This conclusion, however, is a complete *non sequitur*. It may be that the marketing contracts *themselves* are units of property that are protected by the Contracts or Takings Clauses. But the fact that advertisers usually want to rent space on more than one billboard at a time, and that petitioner accommodates its customers by marketing varying packages of its billboards, has nothing whatsoever to do with whether each individual billboard is a separate piece of property protected against government confiscation.

A few examples should make clear the flaw in the court of appeals' reasoning. Imagine a chain of newspapers that sells

advertising space in its publications as a package to national companies; because the newspapers are part of a single "economic unit," the aggregation approach used by the court of appeals would allow a municipality to escape the compensation requirement when it "downzones" a lot on which one of the newspapers' printing plants is located, requiring that the entire parcel be used only as "open space."[16] Or imagine a utility that builds an electric power plant; power from the plant is pooled with that from four other plants before it is sold to customers. If the city downzones the land on which the new power plant sits, under the court of appeals' approach the relevant unit of the utility's property would be all five power plants, because customers purchase power jointly from all. Again, there would be no taking. There is no logical stopping point to this principle.

The consequence of this approach is that regulatory takings protections would become largely meaningless for an owner of economically related units of property. A government (or a court) could always avoid the "categorical" rule recognized in *Lucas* by adding separate pieces of the owner's property to the economic unit until that unit became so large that the relative impact of the challenged regulation began to look small by comparison. By failing even to limit the range of properties subject to this agglomeration to those within Durham's legal jurisdiction, the approach taken below creates the possibility that the impact of a regulation that destroys *all* of an owner's property in one city, or one state, will be measured against the value of that owner's property throughout the United States, or the world. That possibility is not hypothetical: the Fourth Circuit expressly invited such an outcome by concluding that "[i]f [petitioner] advertises * * * [a] product through sharing contracts that are nationwide or in other broadly defined markets, the unit of its affected property may be larger than * * * the business it conducts in the triangle area [of North Carolina.]" App., *infra*, 29a.

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[16] Of course, the takings inquiry still would consider the diminution in value of the aggregated properties. But because only a percentage (perhaps a small one) of the value of the "economic unit" would have been destroyed, the regulation almost certainly would be held not to constitute a regulatory taking. See, *e.g.*, *Penn Central*, 438 U.S. at 131.

Needless to say, this approach runs counter to the central thrust of takings (and regulatory takings) jurisprudence. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan* v. *City of Tigard*, 62 U.S.L.W. 4576, 4578 (June 24, 1994) (citation omitted). And when a regulation denies an owner *all* use of his land, "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 112 S. Ct. at 2894. See also *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 199 (1985). Here, there can be no doubt that a taking would have occurred had the City physically appropriated petitioner's signs and leaseholds, notwithstanding the aggregation theory of the courts below. There is no logical reason why that theory should apply when the City has accomplished precisely the same result — total destruction of the value of physically distinct pieces of property — by regulation. See *Keystone*, 480 U.S. at 516-517 (Rehnquist, C.J., dissenting).

5. The rejection of the takings claim by the courts below also rested on a second questionable holding. After finding that the appropriate unit of property was an aggregation of petitioner's separate billboards and leaseholds, the Fourth Circuit concluded that the Ordinance's 5½-year "amortization period" could be used to justify the regulation on the theory that it acted as "a means of enabling an owner to recoup or minimize his loss." App., *infra*, 30a. The district court implemented this holding on remand, finding that the amortization period helped establish the reasonableness of the Ordinance by allowing petitioner "to recover all or part of the value of the property before the use is forbidden at the end of the period." *Id.* at 16a; see *id.* at 18a.

Whether an amortization period may render noncompensable state action that otherwise would work a taking has divided the lower courts. We recognize that the decision below on the amortization period finds support in holdings from some jurisdic-

tions.[17] But other courts have held such periods irrelevant to the takings calculus, reasoning that "it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon." *Hoffmann* v. *Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965) (en banc). Accord *Ailes* v. *Decatur County Area Planning Comm'n*, 448 N.E.2d 1057, 1060 (Ind. 1983) ("[w]e hold * * * that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law"), cert. denied, 465 U.S. 1100 (1984); *Pennsylvania Northwestern Distribs., Inc.* v. *Zoning Hearing Board*, 584 A.2d 1372 (Pa. 1991); Berger, *Amortization as "Just Compensation": If it Works for Billboards, Can Office Buildings Be Far Behind?*, 1991 INSTITUTE ON PLAN., ZONING, & EMINENT DOMAIN 7-2 (1992). See also *Lamar Advertising of South Georgia, Inc.* v. *City of Albany*, 389 S.E.2d 216, 217 (Ga. 1990) (taking found notwithstanding amortization period); *Loundsbury* v. *City of Keene*, 453 A.2d 1278, 1281 (N.H. 1982) (same).

In our view, an amortization period cannot vitiate state action that otherwise would work a taking. In this case, there existed — at the beginning of the amortization period — leasehold interests in land improved by substantial structures. Those leaseholds and structures remain at the close of that period. The fact that petitioner continued to earn income from use of its property during the amortization period does not in the least alter the fact that its properties retain substantial value today; it was stipulated that petitioner's steel signs would have 34 years of remaining life at the end of the statutory amortization period, and that its wood signs would have 14 years of useful life remaining. We frankly are at a loss to see how the destruction of substantial physical structures that otherwise would stand for decades as income-producing assets can

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[17] See, *e.g.*, *Grant* v. *Mayor and City Council of Baltimore*, 129 A.2d 363 (Md. 1957); *Naegele Outdoor Advertising Co.* v. *Village of Minnetonka*, 162 N.W.2d 206, 213 (Minn. 1968); *Modjeska Sign Studios, Inc.* v. *Berle*, 373 N.E.2d 255, 260 (N.Y. 1977), app. dismissed, 439 U.S. 809 (1978).

be turned into a "non-taking" merely by warning their owner some years before the bulldozers arrive. Indeed, the rationale used below would seem to permit an *immediate* uncompensated taking whenever the affected property had been in the owner's hands for some years prior to enactment of the regulation, an outcome that cannot be squared with the most basic rules of takings jurisprudence.

This conclusion draws substantial support from the Court's holding in *First English*. The Court there concluded that if a regulation deprives a property owner of the use of its property, compensation is due, even if the government later removes the restriction that worked the taking. 482 U.S. at 320-321. That the taking might be of short duration, and later ceases entirely, does not mean that the taking may go uncompensated. *Ibid*. It did not matter in *First English* that the owner, after the taking ceased, would have an opportunity to recoup its investment. The principle of *First English* — that the *timing* of a taking cannot render it a "non-taking" — establishes that if the Durham Ordinance is enforced against petitioner, a taking will occur. The amortization period may delay that taking, but it does not negate it.

In sum, the Ordinance entirely destroys the value of petitioner's billboard structures and leaseholds. Those structures and leaseholds are physically distinct pieces of property — and are recognized as legally distinct under state law. The fortuity that petitioner also has other property in the area that may be marketed jointly with the affected parcels does not affect this practical and legal reality in the slightest. In this setting, "the issue of what constitutes total deprivation [of property] deserves the Court's attention." *Lucas*, 112 S. Ct. at 2926 (statement of Souter, J.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 15, 1994

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Naegele Outdoor Advertising, Incorporated,
d/b/a Naegele Outdoor Advertising Company
of Raleigh-Durham,

Plaintiff- Appellant,

v.

City of Durham,

Defendant-Appellee.

THE SOUTHERN ENVIRONMENTAL LAW CENTER;
NATIONAL TRUST FOR HISTORIC PRESERVATION;
NATIONAL INSTITUTE OF MUNICIPAL LAW
OFFICERS; AMERICAN PLANNNG ASSOCIATION,

Amici Curiae

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
Frank W. Bullock, Jr., Chief District Judge.
(CA-85-722-D)

Argued: September 29, 1993

Decided: March 1, 1994

Before WIDENER, Circuit Judge, and BUTZNER and CHAPMAN, Senior Circuit Judges.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

Naegele sued the City of Durham challenging the city's outdoor advertising signs ordinance under the First, Fifth, and Fourteenth Amendments. The district court granted Durham's motion for summary judgment. On appeal this court affirmed the judgment on the First Amendment issue but reversed and remanded on the Fifth Amendment Takings Clause issues. *Naegele Outdoor*

Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988). We instructed the court to determine whether Naegele's suite was premature and, if not, whether the ordinance denies Naegele economically viable use of its property. To this end, we directed the court to first identify the appropriate unit of Naegele's property affected by the ordinance and then to apply the multi-factor takings analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1979).

On remand, the district court held that Naegele's claim was not premature, and it accepted the parties' stipulations that left no genuine issue as to any material fact. The district court concluded that the Durham ordinance did not effect a taking of Naegele's property requiring just compensation under the Fifth and Fourteenth Amendments. Naegele appeals the court's grant of Durham's motion for summary judgment.

Upon consideration of the record, briefs, and oral argument, we affirm for reasons adequately stated by the district court in its opinion, *Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992).

AFFIRMED

APPENDIX B

NAEGELE OUTDOOR ADVERTISING, INC., d/b/a Naegele Outdoor Advertising Company of Raleigh-Durham, Plaintiff,

v.

CITY OF DURHAM, Defendant.

No. C-85-722-D.

United States District Court, M.D. North Carolina, Durham Division.

Aug. 24, 1992.

MEMORANDUM OPINION

BULLOCK, District Judge.

This case is again before the court to undertake the "difficult"[1] task of determining whether the Defendant City of Durham's ("City") 1984 ordinance prohibiting all commercial, off-premises advertising signs except those along interstate or federally aided primary highways after a 5½-year grace period violates the Fifth Amendment's proscription, applicable to the states through the Fourteenth Amendment, against taking property without just compensation. In its initial decision in this case, the district court granted summary judgment in favor of the City on Plaintiff Naegele Outdoor Advertising, Inc.'s ("Naegele") First and Fifth Amendment claims. On appeal by Naegele, the United States Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the City on the Plaintiff's claim that the ordinance abridged its First Amendment right of free speech, but remanded the Fifth Amendment takings claim for consideration in light of recent decisions by the Supreme Court which set out the necessity for *ad hoc* factual inquiries in takings cases. *Naegele*, 844 F.2d at 177.

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[1] *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir.1988).

I. PROPRIETY OF SUMMARY JUDGMENT

In its appeal to the Fourth Circuit, Plaintiff argued that it rented its billboards on a percentage exposure to the local advertising market, or "showing," basis. Naegele contended that the elimination of the billboards prohibited by the ordinance would adversely affect its integrated business and that it was entitled to compensation not only for the market value of the affected billboards but for the additional loss to the integrated business.

The court of appeals, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), said that the question of taking depended on whether the ordinance denied Naegele the economically viable use of its property. The court of appeals indicated that on remand the district court should determine the appropriate unit of Naegele's property affected by the ordinance as part of its analysis of Naegele's taking claim. The court said that "[t]he appropriate unit is that one which is substantially affected by the ordinance. Its identification depends largely on the scope of Naegele's sharing contracts." *Naegele*, 844 F.2d at 178. The court also said that "[c]learly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes." *Id.* at 176.

After it determined the unit of property, the district court was directed to

> make findings pertaining to every aspect of Naegele's business that will be affected by the ordinance, including the number of billboards that can be economically used for noncommercial advertising, the number that are economically useless, the terms of Naegele's leases for billboard locations, the land Naegele owns for locations and whether it has any other economic use, the cost of billboards that cannot be used, the depreciation taken on these billboards and their actual life expectancy, the income expected during the grace period, the salvage value of billboards that cannot be used, the loss of sharing revenue, the percentage of affected signs compared to the remaining signs in Naegele's business unit, the relative value of affected and remaining signs,

> whether the amortization period is reasonable, and any other evidence presented by the parties that the court deems relevant.

Id. at 178.

It is this task that the court of appeals indicated would be difficult, and the court agrees. Following remand, this court has held three non-evidentiary hearings on the Fifth Amendment issues. After extensive discussions among counsel for the parties and the court, and as a result of suggestions by counsel and by the court, the parties undertook lengthy and exhaustive discovery. As a result of the exchange of information and ideas and negotiations between counsel, the parties have filed extensive factual stipulations that address the issues of fact identified by the court of appeals. These stipulations have resolved any areas of dispute and have enabled the court to focus its attention on the legal aspects of the case.

The court approaches the resolution of any issue in this case by way of summary judgment with great caution, particularly in view of the court of appeals' emphasis on the importance of an evidentiary hearing. However, this circuit recently has held that "while *ad hoc* factual inquiries are central to a takings analysis, summary judgment still may be appropriate, even if only infrequently, should a particular record reveal that the relevant facts are fully developed and that there is no dispute concerning them." *Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 900 F.2d 783, 786 (4th Cir.1990) ("*Waynesville II*").

Although the court of appeals said that the impact of the ordinance on Naegele's business required a full evidentiary hearing, it is doubtful that the court had in mind a situation in which the discovery and stipulations were so thorough and complete that there would be literally no genuine issue as to any material fact and the court could rule as a matter of law based on the undisputed facts. Therefore, the court does not believe that the court of appeals decision, in itself, would preclude the resolution of the issues in this case at the summary judgment stage.

The purpose of summary judgment is to allow resolution of cases without the time and expense of a formal trial if the constraints of Rule 56, Federal Rules of Civil Procedure, are met.

A careful review of the stipulated facts and exhibits has persuaded the court that no genuine issue of material fact remains which would prevent the court from determining the appropriate unit of Naegele's property affected by the ordinance. Once the court has identified the appropriate unit affected, it must then determine whether the ordinance denies Naegele economically viable use of that unit by considering the factors identified in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978): (1) the "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the "character of the governmental action". See *Naegele*, 844 F.2d at 176. Again, the court believes that the material facts as stipulated enable it to make the findings relevant to the application of the *Penn Central* factors.

II. MATURITY OF THE TAKING CLAIM

As a preliminary matter, the court must consider whether Naegele's claim is premature. *Naegele*, 844 F.2d at 174-75 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 [1985], in which the Supreme Court held that a claim by a land developer that a county unconstitutionally took its property through the enactment of a zoning ordinance was premature because the developer had neither sought a variance nor utilized state procedures for obtaining just compensation). In a case decided after *Naegele*, the Fourth Circuit held that a plaintiff outdoor advertising company suffered actual, concrete injury to the primary use of its property upon the enactment of an ordinance requiring removal of certain non-conforming outdoor advertising signs at the expiration of a 5½-year amortization period. *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992). The court held that on the date the ordinance was enacted there was both substantial interference with the property's primary use which affected distinct investment-backed expectations and concrete injury accompanying that interference. *Id.* at 1164. The court specifically rejected *Williamson County* as inapposite because the Raleigh ordinance did not contain any variance or compensation procedures through which a sign owner might obtain relief other than the amortization period.

Id. at 1166. Like the ordinance at issue in *National Advertising*, the Durham ordinance contains no variance or compensation procedures and Naegele's claim is ripe for review. *See Lucas v. South Carolina Coastal Council*, — U.S. —, —, 112 S.Ct. 2886, 2891-92, 120 L.Ed.2d 798 (1992).

Even if Naegele were required to apply for just compensation in order to make its claim mature, such an application would very likely be denied. North Carolina General Statute § 40A-51 permits an action in inverse condemnation to recover just compensation for an alleged taking. If Naegele had filed such an action, there is little likelihood that it would have prevailed in light of North Carolina court decisions finding no compensation due when a challenged ordinance contained an amortization period. *See State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975); *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C.App. 533, 386 S.E.2d 439 (1989), *review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990); *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982). If Naegele had utilized the North Carolina procedure, it would be in virtually the same position it is now: the City would refuse to pay Naegele. Given this court's jurisdiction to hear the Fifth Amendment claim, it would be futile and a waste of judicial resources to require Naegele to apply for and be denied just compensation before continuing this action. *Cf. Georgia Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43, 47 (4th Cir.1987) ("*Waynesville I*"). Thus Naegele's claim is ripe for resolution by this court.

III. THE UNIT OF PROPERTY

The court's next task is to determine the unit of Naegele's property affected by the ordinance. The parties have stipulated to the facts necessary for the court to resolve this question, and both have moved for summary judgment. As a result of the stipulations, the undisputed facts include the following. The land on which each sign is located is not owned by Naegele, but is leased from the landowner under a written contract. Joint Stipulation of Undisputed

Facts, Ex. A, ¶ 13 (Dec. 11, 1991) [hereinafter "Stip. A"].[2] Each lease allowing construction of a sign is negotiated separately. *Id.* Each sign, which may contain more than one sign face, is recognized as an individual structure by the City and is subject to separate inspection and permitting procedures. *Id.* at ¶ 26. Each sign is taxed separately. *Id.* at ¶ 35.

Naegele's commercial advertising is marketed and purchased on a "showing" or "share" basis. For example, a customer desiring a "fifty showing" in the Durham metro market would purchase billboard space sufficient to convey its message to fifty per cent (50%) of the driving audience in a given time period. Naegele's standard rates in the Durham metro market are based on twenty-five, fifty, seventy-five and one hundred showings. *Id.* at ¶ 28. Only 1.7% of Naegele's advertising between September 1, 1986, and December 31, 1989, was sold on an individual sign basis. *Id.* Thus, the undisputed facts indicate that over a three-year period 98.3% of Naegele's billboard advertising customers purchased a showing of at least the Durham metro market rather than individual signs. Moreover, 65.86% (7,064 of 10,726) of the sign faces Naegele sold between 1985 and 1989 were for Durham-only showings. Joint Stipulation of Undisputed Facts, Ex. B, ¶ 46 (Dec. 11, 1991) [hereinafter "Stip. B"].

As the Supreme Court said in *Penn Central*, "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130, 98 S.Ct. at 2662. The proper focus is on the character of the action and the nature and extent of the interference with rights in the parcel as a whole. *Id.* at 130-31, 98 S.Ct. at 2662. This case differs from many takings cases in that the Durham ordinance affects multiple properties owned by one entity. Naegele argues that the unit of property affected by the ordinance is its leasehold interest in each individual sign. On the other hand, the City contends that the unit

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[2] The parties have stipulated to facts that are undisputed for any purpose in Exhibit A, and facts that are undisputed only for purposes of summary judgment in Exhibit B, to the Joint Submission.

of property is relevant only if this court determines that the 5½-year amortization period is inadequate.[3]

In the alternative, the City argues that because Naegele accounts for the revenues earned in the Durham area advertising market only as a component of the much larger Raleigh/Durham operating division and not as a separate division, Stip. A at ¶ 31, the Raleigh division is the appropriate unit of property. This division covers most of eastern North Carolina. *Id.* at ¶ 30. According to the City, the smallest possible unit of property is the Durham metro market because Naegele sells the signs in this market as a unit.

The court agrees with the City's last contention, particularly given the stipulation showing that virtually all of Naegele's advertising sales are of combinations of signs in the Durham metro market, and not sales of individual signs. "Clearly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes." *Naegele*, 844 F.2d at 176. If Naegele owned only one sign, and the use of that sign were prohibited by the Durham ordinance, the court would, of course, look to that one sign as the unit of property. But since the reality of Naegele's business is that Naegele combines the leasehold interests in its signs into a unit in selling outdoor advertising in the Durham area, it follows that the unit of property to be considered for takings purposes is the combined group of Durham metro area signs.[4]

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[3] While it is true that the amortization period is not irrelevant to the takings analysis, *Naegele*, 844 F.2d at 177, the court must first establish the unit of property as a basis for determining, via the three-factor *Penn Central* test, whether a taking has occurred. *See, e.g., National Advertising*, 947 F.2d at 1164 n.6; *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169-70 (4th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 3027, 120 L.Ed.2d 898 (1992); *Waynesville II*, 900 F.2d at 787.

[4] In reaching this conclusion about the unit of Naegele's property affected by the ordinance, the court has not aggregated Naegele's unrelated property interests in a particular vicinity, *see Lucas*, — U.S. at — n.7, 112 S.Ct. at 2894 n.7 (state court's aggregation of total value of

This finding comports with existing takings law. *See Penn Central*, 438 U.S. at 130-31, 98 S.Ct. at 2662; *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.") Accordingly, Naegele's motion for summary judgment will be denied, and the City's motion for summary judgment on the unit of property issue will be granted.

IV. RELEVANT ASPECTS OF NAEGELE'S BUSINESS

Having determined the maturity of Naegele's claim and the appropriate unit of its property, the court next must determine whether the interference with Naegele's property resulting from the enactment of the ordinance was of such a magnitude to constitute a taking. *National Advertising*, 947 F.2d at 1164. Whether the ordinance denies Naegele the economically viable use of its property is a factual inquiry. *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. As previously noted, three broad factors are particularly significant to this inquiry: (1) the economic impact of the ordinance on Naegele; (2) the extent to which the ordinance interferes with Naegele's investment-backed expectations; and (3) the character of the governmental action. *Id.; see Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979).

In its most recent decision on a takings claim, *Lucas v. South Carolina Coastal Council*, the Supreme Court added a fourth area of inquiry to the takings analysis. If an evaluation of the three Penn Central factors indicates that the challenged regulation deprives property of "all economically beneficial use, ... [the government] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

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all real property in vicinity owned by plaintiff in *Penn Central* was "extreme" and "unsupportable" approach to takings calculus). Rather, the court has considered the particular facts of this case and the nature of the outdoor advertising business in concluding that the relevant unit of Naegele's property is its business in the Durham metro area.

Lucas, — U.S. at —, 112 S.Ct. at 2899. Before conducting the *Penn Central* analysis and determining whether to apply the *Lucas* test, the court will evaluate the record in light of the stipulated facts and consider the evidence relevant to the takings inquiry identified by the court of appeals in *Naegele*, 844 F.2d at 178.

Number of Billboards Usable for Non-Commercial Advertising

Generally, non-commercial advertisers will not advertise unless the advertising is free or very low cost. Stip. B at ¶ 55. The total revenue for non-commercial advertising was $148,587.10 between 1984 and 1989: $13,422.00 in 1984; $14,172.50 in 1985; $44,015.00 in 1986; $21,440.10 in 1987; $30,676.80 in 1988; and $24,860.70 in 1989. *Id.* at ¶ 47. Despite this revenue, the parties agree that no economically viable market exists for non-commercial advertising on the structures that otherwise must be removed to comply with the ordinance. *Id.* at ¶ 54.

Number of Billboards that are Economically Useless

All 105 or 106 sign faces (64 to 70 sign structures) affected by the ordinance are economically useless because they cannot be used for commercial or non- commercial advertising and they have no salvage value. *Id.* at ¶¶ 50-53.

Terms of Naegele's Leases for Billboard Locations

The parties have stipulated to the leasing history of each of the disputed signs. Stip. A at ¶ 15. The average maximum lease term, including extensions, for the disputed signs was 8.6 years per face as of September 4, 1984. *Id.* at ¶ 16a. The average time remaining on the leases, without options to extend, for the disputed sign faces was 5.9 years as of September 4, 1984. *Id.* at ¶ 16b. The average annual lease payment per face as of September 4, 1984, was $200.00. *Id.* at ¶ 16c. The leases allow Naegele to reduce its rent, pay no rent, or cancel the lease if a government regulation restricts the use of the sign. *Id.* at ¶ 17. The lessor may terminate the lease if he or she decides to develop the land. *Id.* at ¶¶ 19-20. Naegele owns the signs as personal property and must remove them when the leases expire. *Id.* at ¶ 18.

Land Naegele Owns for Locations and Whether it has Any Other Economic Use

Naegele does not own any land on which billboards are located. All sites are leased. *Id.* at ¶ 13. Although the property owner may use the property surrounding a sign for purposes other than advertising, Naegele's only use of the leasehold is for advertising. *Id.* at ¶ 14.

Cost of Unusable Billboards

The court is uncertain what the court of appeals meant by "cost." Examples of cost include original construction cost, removal cost, and replacement cost. The total tax value of the disputed signs as of 1990 was $126,420.00. *Id.* at ¶ 35. Because construction cost data exists for only some of the signs, the best available method of approximating the original cost of the signs is to use the greater of the 1984 tax value or the original construction cost. Using this method, the total original cost of the disputed signs is $130,435.00. *Id.* at ¶ 39. The total removal cost for the disputed signs is $84,677.31. Stip. B at ¶ 49. The average removal cost per face is $781.65. *Id.* at ¶ 49a. The replacement cost of the disputed signs is $428,136.00. Stip. A at ¶ 36. There is no "carrying cost" of the unusable signs because the leases allow Naegele to terminate a lease upon an adverse regulatory action. *Id.* at ¶ 17.

Depreciation Taken on Usable Billboards and Their Actual Life Expectancy

Major Media of the Southeast, Naegele's predecessor, depreciated the signs over fifteen years for accounting purposes. *Id.* at ¶ 27. Naegele depreciates its signs over twenty years for accounting purposes, and over five years for tax purposes. *Id.* The life expectancy of the signs exceeds the period Naegele uses or has used for accounting purposes. *Id.* As of September 4, 1984, the life expectancy of a wooden sign was more than twenty years, and of a steel sign more than forty years. Stip. B at ¶ 48. There are eighty-two steel and twenty-one wooden disputed signs now standing. Stip. A at ¶ 10. The average age of the disputed faces

is 15.2 years as of September 4, 1990, and 9.2 years as of September 4, 1984.[5] *Id.* at ¶¶ 10, 16d.

Income Expected During the Grace Period

The parties stipulated to revenue earned from January 1, 1984, to December 31, 1989. *Id.* at ¶ 23. Total revenue from the disputed signs during that period was $1,707.759.18. *Id.* Total revenue in the Durham zoning jurisdiction was $4,882,367.21. *Id.* The total in the Durham metro area was $5,741,222.78. *Id.*

Salvage Value of Unusable Billboards

The cost to remove the billboards is greater than the average salvage value of the sign parts that would be removed. Stip. B at ¶ 50. Naegele has more spare parts than it can use in the foreseeable future in Durham or any of its other divisions. *Id.* at ¶¶ 51-52. Even if salvaged parts could be used in other divisions, such use is impracticable due to the high cost of shipment and probability of damage in transit. *Id.* at ¶ 53. Therefore, the unusable billboards have no salvage value.

Loss of Sharing Revenue

The parties contend that the value of the remaining signs is decreased because Naegele's market coverage of the Durham area is reduced as a result of the ordinance. *Id.* at ¶ 56. Yet the parties have not offered any stipulations or evidence as to the dollar amount of the decrease in value of the remaining signs. Furthermore, the parties have stipulated that as of 1984 the fair market value ("FMV") of Naegele's signs in the Durham metro area, or any group of signs within it, was four times their annual revenue. Stip. A at ¶ 3. As of 1990, the FMV "of the signs within the Durham metro market, or of any group within that market" was 3.5 times their annual revenue. Stip. B at ¶ 45.

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[5] These figures were derived from the sign ages provided in Attachment 2 to Stip. A, ¶ 10. The court notes that these figures may be obtained only by dividing by sixty sign *structures*, not 102 sign *faces*, although Stip. A, ¶ 16d states the sign age in terms of faces. In addition, Attachment 2 lists 106, not 102, sign faces. The average age of the 106 sign faces is 8.75 years as of 1984, and 14.75 years as of 1990.

Because these stipulations assign the same multiplier regardless of the number of signs under consideration or whether they are covered by the ordinance, any argument that the ordinance adversely affects Naegele's integrated business rather than the individual signs alone seems to be foreclosed. Nevertheless, the parties agree that because the demand for advertising on a showing basis is much higher than that for individual signs, the reduction in sign coverage caused by the ordinance reduces the amount of showing advertising available. *Id.* at ¶¶ 56-57.

Between January 1, 1985, and December 31, 1989, Naegele sold 3,662 faces located in Durham as part of advertising contracts that included signs from outside the Durham metro area. *Id.* at ¶ 46. Revenue from the Durham faces in those larger contracts totaled $862,465.33 in that period. *Id.* During the same time period, Naegele sold a total of 7,064 faces as part of a Durham only showing; revenue from these Durham signs totaled $1,551,687.44. *Id.* Hence, of the 10,726 Durham sign faces sold in that period, 34.14% were sold as part of showings that included signs outside the Durham metro area.

These figures are not entirely helpful because they do not reveal what portion of the revenue came from signs affected by the ordinance. If the disputed signs contribute 29.75% of the total revenue, Stip. A at ¶ 23, a projection of the sharing revenue that will be lost during a comparable period after the ordinance becomes effective is 29.75% of $862,465.33, or $256,583.44.

Percentage of Affected Signs Compared to Remaining Signs in Naegele's Business Unit

Given that a taking is measured from the date the challenged ordinance is enacted, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987); *National Advertising*, 947 F.2d at 1163, the benchmark for the number of signs affected is the face count as of 1984 rather than the number of faces that currently exist. In 1984, there were 123 signs affected by the ordinance, and a total of 270 in the Durham metro area. Stip. A at ¶ 25. Currently, there are 105 disputed signs and a total of 231. *Id.* The percentage of affected signs compared to remaining signs was

83.6% in 1984 and 83.3% in 1990.[6] The ordinance reduces the total number of signs in the Durham metro market by 45.5% as of either date.

Relative Value of Affected and Remaining Signs

Like cost, value is a nebulous concept. One way to measure value is by looking at revenue generated. Total revenue from the disputed signs from 1984 to 1989 was $1,707,759.18. Total revenue in the Durham zoning jurisdiction was $4,882,267.21. The total in the Durham metro area was $5,741,302.78. *Id.* at ¶ 23. Based on the contribution of the disputed signs to Naegele's Durham metro area revenue during the amortization period, Naegele will lose a projected 29.75% of its annual revenue in that area when the ordinance becomes effective.

The FMV of the signs in 1984 was four times their annual gross revenue. *Id.* at ¶ 3. Using this methodology, in 1984 the FMV of the disputed signs was $998,849.04, and the FMV of the non-disputed faces was $2,159,853.92. *Id.* at ¶ 23. The total 1984 FMV of all Durham metro area signs was $3,158,702.96. *Id.* The value of the disputed signs represents 46.25% of the value of the non- disputed signs, and 31.62% of the value of all signs in the Durham metro area.

In comparison, the FMV of the signs as of 1990 was 3.5 times their estimated annual gross revenue. Stip. B at ¶ 45. Using this methodology, the 1990 FMV of the disputed faces in the Durham metro market was $965,525.00, and the FMV of the non-disputed faces was $2,568,925.00. *Id.* The 1990 FMV of all signs in the Durham metro area was $3,534,450.00. *Id.* The value of the disputed signs represents 37.59% of the value of the undisputed signs and 27.32% of the total value of all signs.

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[6] The Fourth Circuit specifically requested this comparison. The percentage was derived for 1984 by subtracting 123 from 270, then dividing 123 by the result of 147. For 1990, 105 was subtracted from 231, then 105 was divided by the result of 126.

Reasonableness of the Amortization Period

The inclusion of an amortization period in a zoning ordinance allows the property owner, if he cannot make his use of the property conform to the ordinance, to recover all or part of the value of the property before the use is forbidden at the end of the period. *Waynesville II*, 900 F.2d at 785; *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 754 (N.D.1978), *appeal dismissed*, 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206, 213 (1968). Amortization periods have been used in lieu of eminent domain proceedings, which require the payment of compensation, *State v. National Advertising Co.*, 409 A.2d 1277 (Me.1979), and instead of forbidding a non-conforming use as of the date of enactment, which could effect a taking. *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 365, 373 N.E.2d 255, 260 (1977), *appeal dismissed*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978); *Grant v. Mayor of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957).

The presence of an amortization period does not establish the validity of the ordinance as a matter of law, nor does the absence of such a provision render such an ordinance an unconstitutional taking. *Waynesville II*, 900 F.2d at 786; *Naegele*, 844 F.2d at 177. For an amortization period to be reasonable it must give the property owner a reasonable opportunity to recoup or minimize the loss of use of his property by the end of the amortization period. *Id.*

Factors relevant to the reasonableness of the amortization period include many of those discussed above, including the initial cost of, or investment in, the signs, the degree to which the signs have been fully depreciated, the remaining useful life, the replacement cost and salvage value of the signs, the alternative uses for the signs, the loss of revenue as a result of the ordinance, and the percentage of signs affected. *See also Tahoe Regional Planning Agency v. King*, 233 Cal.App.3d 1365, 285 Cal.Rptr. 335, 353 (1991); *City of Salinas v. Ryan Outdoor Advertising, Inc.*, 189 Cal.App.3d 416, 234 Cal.Rptr. 619, 623 (1987); *Inhabitants, Town of Boothbay v. National Advertising Co.*, 347 A.2d 419, 424-25 (Me.1975); *Modjeska Sign Studios*, 402 N.Y.S.2d at 367, 373

N.E.2d at 262; *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 941-42 (Tex.Civ.App.1978), *writ ref'd n.r.e.* (Jan. 17, 1979), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). As noted above, Naegele received $1,707,559.18 from the disputed signs during the amortization period. Naegele has benefitted from income it earned from the disputed signs for two additional years while this litigation has been pending. The revenue Naegele earned from the disputed signs between 1984 and 1989 far outweighs the estimated original construction cost of $130,435.00, the removal cost of $84,677.31, and the replacement cost of $428,136.00. Naegele aiso has received nearly twice the 1984 FMV of the disputed signs during the amortization period. Because the leases contain a termination clause, Naegele will not suffer any loss because of continued liability on its leases.

Although a number of the signs are not fully depreciated and have useful lives remaining after the expiration of the amortization period, the reasonableness of an amortization period does not necessarily depend on the recovery of all value of the property during the allotted time. *See Waynesville, II*, 900 F.2d at 786; *Modjeska*, 402 N.Y.S.2d at 367, 373 N.E.2d at 262. Thus the failure of the amortization period to allow Naegele's recovery of the present value of the income stream it could expect from the signs over their remaining useful lives does not render it unreasonable.

V. ECONOMIC IMPACT OF THE ORDINANCE

As a result of the findings made above on the relevant aspects of Naegele's business, the court can now address the inquiries identified in *Penn Central* to determine if the ordinance denies Naegele the economically viable use of its property. One of the difficulties in regulatory takings cases is deciding where to draw the line between government's right to regulate for the public good and the right of a private property owner to use his property without interference. *Cf. Lucas*, — U.S. —, 112 S.Ct. at 2895. Neither right is absolute. "[G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel

the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. at 65, 100 S.Ct. at 326; *accord Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). However, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, — U.S. —, 112 S.Ct. at 2895.

The Durham ordinance must be evaluated in light of its impact on the entire set of Naegele's property interests. Naegele retains the use of 126 of 232, or 54%, of its signs in the Durham metro market. The ordinance destroys all economically beneficial use of the remaining 106 signs at the expiration of the amortization period. The loss of the affected signs will likely reduce Naegele's revenue by 29.75% in the Durham metro market, but this fact alone is not dispositive of the takings question. *Penn Central*, 438 U.S. at 131, 98 S.Ct. at 2663.

Whether or not the revenue recovered during the amortization period might be "just compensation" if a "taking" had occurred, the benefit conferred by the grant of an amortization period may be taken into account in considering the economic impact of the regulation. *See Penn Central*, 438 U.S. at 137, 98 S.Ct. at 2666 (landowner's transferrable development rights conferred by government program mitigate financial burden imposed even if not "just compensation"). By virtue of the amortization period granted in the ordinance, Naegele has earned more than $1.7 million in revenue and has had 5½ additional years of use of the disputed signs. Based on its earnings during the amortization period, Naegele will lose this revenue, which includes an estimated $256,583.44 in sharing revenue, during a comparable time period after the ordinance is enforced. Nonetheless, Naegele has not contended that its outdoor advertising business in the Durham metro market will no longer be viable after the ordinance requires removal of the affected signs. Naegele has recovered nearly twice the fair market value of the disputed signs during the amortization period, and there is no evidence that Naegele will not be able to realize a reasonable return on its remaining signs.

VI. INTERFERENCE WITH INVESTMENT-BACKED EXPECTATIONS

When Morris Communications Corporation purchased the assets of Major Media of the Southeast (Naegele's predecessor) on July 18, 1985, the purchase price of $400 million was not adjusted to account for the diminished value of the Durham signs as a result of the ordinance. Stip. A at ¶¶ 1, 2, 9. There was no downward adjustment because Morris expected that Naegele would be paid the fair market value of any signs required to be removed. *Id.* at ¶ 9. This type of expectation differs from that motivating a substantial investment to improve property before the owner knows its use will be limited by government action, *see Kaiser Aetna*, 444 U.S. 164, 100 S.Ct. 383, but indicates that Morris contemplated having either the use of the signs or compensation for the inability to continue to use them.

It is doubtful that this expectation was logical in light of takings jurisprudence as of 1985 and the prior experience of outdoor advertisers in Fifth Amendment litigation.

> A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights ... the state cannot be the guarantor by inverse condemnation proceedings, of the investment risk which people choose to take in the face of statutory or regulatory impediments.

Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287, 291 (1984); *see Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8 (1989). Further, a reasonable property owner must expect that the uses of his property may be restricted from time to time by the state in the legitimate exercise of its police power. *Lucas*, — U.S. —, 112 S.Ct. at 2894. This is especially true in the case of personal property such as signs and leases for sign locations. *Id.*

The useful lives of the signs are another factor in the investment-backed expectations analysis. As of September 4, 1984, the average age of the disputed signs was 9.2 years, and the life

expectancies of the wooden and steel signs were twenty and forty years, respectively. Thus, the wooden signs had an average of almost eleven years of remaining useful life, and the steel signs had an average of nearly thirty-one years of remaining useful life. Although the disputed signs had significant remaining useful lives, there was an average of only 8.6 years remaining on the leases for the disputed signs, including all possible extensions, as of September 4, 1984. Thus, the amortization period allowed Naegele the continued use of the disputed signs for most, if not all, of their remaining lease terms. These facts were known, or could easily have been ascertained, at the time of Morris' purchase in 1985.

VII. CHARACTER OF THE GOVERNMENT ACTION

"A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659 (citation omitted); *accord Lucas*, — U.S. —, 112 S.Ct. at 2893; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868 (1982). The Durham ordinance is not a physical invasion of Naegele's property, and has been found to be a legitimate exercise of the police power regulation for aesthetic purposes. *Naegele*, 844 F.2d at 174.

CONCLUSION

Without question, Naegele has suffered a significant loss in the economic value of its property, as much so as if the City had put a highway directly over the underpinnings of its billboards. Regulatory deprivations, however, have been held by the Supreme Court to be outside the scope of the takings clause unless they go "too far." It has also been held that the Constitution does not protect economic values from diminution by government regulation. Applying these standards, the court must conclude that the Durham ordinance does not go too far. Naegele has not suffered a physical invasion of its property in the usual sense, and it has not been deprived of all economically viable use of its property interests as

a whole.[7] The court is not writing on a clean slate. In order to provide equal justice under law, inferior federal courts must apply today's law regardless of any perceived trend toward greater recognition of private property rights. The court therefore concludes that the Durham ordinance does not deny Naegele all economically viable use of its property and thus does not constitute a taking, and will grant the City's motion for summary judgment on Naegele's Fifth Amendment claim.

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[7] The court is not unmindful of the significance of its determination that each individual sign does not constitute a separate unit of property. If it did, the *Lucas* inquiry into the nature of Naegele's title could be determinative. See *Lucas*, — U.S. at —, 112 S.Ct. at 2894.

APPENDIX C

NAEGELE OUTDOOR ADVERTISING, INC., d/b/a Naegele Outdoor Advertising Company of Raleigh-Durham, Plaintiff-Appellant,

v.

CITY OF DURHAM, Defendant-Appellee,

The Outdoor Advertising Association of America, Inc. (OAAA); North Carolina Restaurant Association, Amici Curiae.

No. 87-1599.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 6, 1988.

Decided April 15, 1988.

Before WIDENER and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

Naegele, a major outdoor advertising company, seeks to have a billboard ordinance adopted by the city of Durham invalidated as violative of Naegele's first and fifth amendment rights, applicable to the states through the fourteenth amendment. It also seeks damages for injuries it claims it has already suffered. The district court granted summary judgment in favor of the city. We affirm the district court's disposition of the first amendment issue, vacate the entry of summary judgment on the fifth amendment "taking" issue, and remand the case for further proceedings.

I

In 1984 Durham adopted a billboard ordinance which, as amended in 1985, prohibits all commercial, off-premise advertising signs except alongside interstate or federally-aided primary highways. The ordinance permits the continuing display of noncommercial advertising signs, paid or unpaid, but prohibits altogether the construction of any new off-premise outdoor

advertising structures. The ordinance provides a delay or amortization period of five and one-half years before nonconforming signs will be prohibited, a deadline falling on March 4, 1990. Naegele owns thousands of signs in several states and 137 in Durham. Of these, 85 billboards carrying a total of 131 advertising "faces" will not be permitted to display commercial advertising after the expiration of the amortization period.

II

The principal first amendment challenge which Naegele raises on appeal is that the Durham ordinance does not in fact advance its avowed goals of traffic safety and aesthetics. Naegele tendered proof that the ordinance would not improve traffic safety. It also argued that, because the affected billboards are all located in industrial or heavy commercial areas, the aesthetic justification is untenable in this instance. Naegele contends that since there are genuine issues of material fact on the question whether the ordinance furthers any governmental interest, the validity of the restriction on first amendment expression cannot be decided by summary judgment.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503-16, 101 S.Ct. 2882, 2890-97, 69 L.Ed.2d 800 (1981), a plurality of the court recognized that an ordinance prohibiting off-premise commercial billboard advertising would not have offended the first amendment if it had not preferred commercial over noncommercial advertising. Legitimacy of such an ordinance was predicated on the city's interest in improving traffic safety and the appearance of the city. Relying on that case, we have affirmed summary judgments upholding against first amendment challenge the constitutionality of ordinances prohibiting off-premise commercial billboards. *See Georgia Outdoor Advertising, Inc. v. Waynesville*, 833 F.2d 43 (4th Cir.1987), and *Major Media of the Southeast v. Raleigh*, 792 F.2d 1269 (4th Cir.1986). The Durham ordinance avoids the preference of commercial over noncommercial speech that invalidated the *San Diego* ordinance and is substantially similar to the ordinances considered in *Raleigh* and *Waynesville*.

While the evidence regarding traffic safety offered by Durham is far from conclusive, we noted in *Waynesville* that "aesthetics alone is a sufficient justification" for this type of police power

regulation. *Waynesville*, 833 F.2d at 46; *accord Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), *appeal dismissed*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978); *Suffolk Outdoor Advertising Co. v. Hulse*, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), *appeal dismissed*, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). Contrary to Naegele's contention, the location of the billboard in commercial and industrial areas does not preclude the city from relying on aesthetics to justify its exercise of police power. The San Diego ordinance banned billboards in similar areas. *See* 453 U.S. at 531, 101 S.Ct. at 2904 (Brennan, J., concurring in the judgment). Nevertheless, the plurality found this to be no impediment to its validity.

In sum, we find no principled distinction between the Durham ordinance and those ordinances which have been found not to violate the rights of sign owners secured by the first amendment. The district court properly granted summary judgment in favor of the city on Naegele's claim that the ordinance abridged its right of free speech in violation of the first and fourteenth amendments.

III

The fifth amendment provides in part, "nor shall private property be taken for public use, without just compensation." The fourteenth amendment applies this restriction to the states. *See Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Naegele charges that the district court erred in holding as a matter of law that the Durham ordinance does not take its property in violation of the takings clause.

Naegele, the city, and the district court have assumed that the claim of unconstitutional taking is mature. The Supreme Court, however, has cautioned against premature decision of these claims—most recently in *Pennell v. San Jose*, — U.S. —, 108 S.Ct. 849, 856, 99 L.Ed.2d 1 (1988):

> Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, ... we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided

> except in an actual factual setting that makes such a decision necessary."

In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Court held that a claim by a land developer that a county unconstitutionally took its property through the enactment of a zoning ordinance was premature. The Court pointed out that the developer had not sought a variance nor utilized state procedures for obtaining just compensation. The Court stated:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.... Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking.... If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government for a taking."

473 U.S. at 194-95, 105 S.Ct. at 3121 (citations omitted).

The parties' assumption that Naegele's taking claim is mature may be well founded. As the district court pointed out in another context, the North Carolina Court of Appeals has held that a town's rezoning power authorizes enactment of a sign ordinance similar to Durham's, and the North Carolina Supreme Court has held amortization to be appropriate for nonconforming uses. *See R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982); *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975). Therefore, it is possible that it would be futile for Naegele to institute an inverse condemnation suit to recover compensation. Furthermore, the city does not contend that there is any realistic likelihood that Naegele would be granted a variance.

Nevertheless, in view of the Supreme Court's admonition, on remand the district court should instruct the parties to address the question of prematurity, and the court should state its findings and conclusions on this issue. The court should proceed to try the merits of the claim only if it is mature.

IV

Naegele predicates its claim of unconstitutional taking primarily on its proffer of the following evidence. Naegele rents on a "showing" basis, an industry practice of renting several billboards throughout the area to carry the same advertising. Prohibition of the directly affected billboards will have an adverse effect on Naegele's integrated business. Naegele's appraiser estimated the market value of the affected 85 billboards to be in excess of $1,500,000. The appraiser estimated additional loss to the integrated business, which Naegele terms severance damage, at $1,300,000, bringing the estimated total loss to about $2.8 million. Naegele also tendered evidence that the land owned or leased for billboard sites had little other commercial use and that moving the billboards is economically impractical. The life of the billboards, according to Naegele, far exceeds the amortization period of five and one-half years allowed by the ordinance.

The city contends that inasmuch as it will not physically seize Naegele's nonconforming signs, Naegele will retain full benefit of them for its own use, reuse, salvage, or other purposes. It emphasizes that Naegele can use its signs for noncommercial advertising or move them to locations where they are permitted. The city asserts that the amortization period makes the ordinance a reasonable exercise of police power.

The district court, finding "little doubt as to how [Durham's] sign ordinance will restrict Naegele's signs," stated that "the only question here is whether the legal effect of Durham's sign ordinance amounts to the taking of private property for public use without just compensation, a question of law which the court can decide." Grounding his conclusion in part on his belief that Naegele could economically transfer banned billboard structures to other locations, and in part on the effect of the amortization period, the district judge found that the ordinance would not impose a

substantial loss on Naegele, and hence that it did not amount to a regulatory taking.

In *Raleigh* we affirmed an entry of summary judgment, holding that an amortization period of five and one-half years was not so unreasonable that a billboard ordinance constituted a taking of the sign company's property. We cautioned, however, that "we do not purport to hold that the owner of a sign can invariably recoup its investment in such a time span." 792 F.2d at 1274.

Recent cases decided by the Supreme Court raise questions about the propriety of summary judgment of takings claims without a fully developed factual record. The record discloses genuine issues of material fact about the effect of the ordinance on Naegele's business. For example, the parties differ about the economics of moving signs, their salvage value, the effect on "sharing" sales, and the overall impact of the ordinance on Naegele. The city suggests that Naegele will benefit from the growth and economic development that the ordinance is intended to foster. Naegele does not subscribe to this prediction. These factual differences cannot be deemed immaterial as a matter of law simply because the city has allowed an amortization period of five and one-half years.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, — U.S. —, 107 S.Ct. 1232, 1242, 94 L.Ed.2d 472 (1987), the Court reiterated that land use regulation can effect a taking if it "'does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land,'" *quoting Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

In part II of this opinion, we concluded that the Durham ordinance advances a legitimate state interest in aesthetics. This conclusion upholds the ordinance against Naegele's claim of taking with respect to the first prong of the test prescribed by the court. The question of taking is therefore narrowed to the second prong—whether the ordinance denies Naegele economically viable use of its property.

The next question in an analysis of Naegele's taking claim is the designation of the appropriate unit of Naegele's property

affected by the ordinance. The Court explained in *Keystone*, 107 S.Ct. at 1248, the importance of this inquiry:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone involved a facial challenge to a statute that prohibited coal mining that causes subsidence damage to pre-existing public buildings, dwellings, and cemeteries. The coal companies contended that the state appropriated some 27 million tons of coal that must be left in place to avoid subsidence and that the state also had taken a separate interest in their property, the support estate. 107 S.Ct. at 1249. The Court rejected this argument. It held that the 27 million tons of coal and the support estate did not constitute a separate segment of property for taking purposes. Quoting from *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978), the Court explained:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole* — here the city tax block designated as the 'landmark site.'"

107 S.Ct. at 1248.

Guided by these precepts, the district court, on remand, must determine the appropriate unit of Naegele's property after an evidentiary hearing on this issue. Clearly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes. See 107 S.Ct. at 1249.

Naegele argues that the prohibition against some of its signs will lessen the value of the remaining signs because of its "sharing"

method of marketing—that is, selling advertising for the same product on numerous billboards. If the sharing market is confined to the triangle area of North Carolina, it would appear that the appropriate unit of property is Naegele's business in this area. There is some indication in the record that a substantial part of Naegele's business is cigarette advertising. If Naegele advertises cigarettes or any other product through sharing contracts that are nationwide or in other broadly defined markets, the unit of its affected property may be larger than in the business it conducts in the triangle area.

The third step in the analysis of Naegele's claim is to determine whether the ordinance denies Naegele economically viable use of the appropriate unit of its property by considering the following factors identified in *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659: (1) The "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment-backed expectations," (3) the "character of the governmental action."

The dispute about the impact of the ordinance on Naegele's business requires a full evidentiary hearing. Resolution of the dispute by plenary hearing rather than by summary judgment is particularly important in cases involving claims of regulatory taking. In a case decided after the district court entered judgment, the Supreme Court stated: "Determination of the question whether a governmental property regulation amounts to a 'taking' requires ad hoc factual inquiries ..." *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076, 2077, 95 L.Ed.2d 668 (1987). The inquiries are directed to the factors identified in *Penn Central*, which are quoted in the preceding paragraph. Drawing on its precedents, the Court emphasized the necessity of factual inquiry. In *Keystone*, 107 S.Ct. at 1247, it reiterated: "'These "ad hoc factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.'"

The allowance of an amortization period of five and one-half years does not establish the validity of the ordinance as a matter of law. Nor is it irrelevant, as Naegele contends. It is one of the facts that the district court should consider in defining the character

of governmental action, which is the third factor mentioned in *Penn Central*. With reference to this factor the Court explained that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124, 98 S.Ct. at 2659 (citation omitted). The Court amplified the inquiry concerning governmental action in *Agins*, 447 U.S. at 260-61, 100 S.Ct. at 2141:

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, ... the question necessarily requires a weighing of private and public interests. (citations omitted).

A majority of courts that have considered amortization periods of various lengths have approved them as a means of enabling an owner to recoup or minimize his loss. *See* Model Land Development Code, Art. 4 and commentary, pp. 146-50 (1975). In *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 366-67, 373 N.E.2d 255, 261-62 (1977), *appeal dismissed*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978), perhaps the leading case on this issue, the court considered a six and one-half years' amortization period for removal of nonconforming billboards. The court recognized that the reasonableness of the amortization period could not be decided on summary judgment, and it remanded the case for an evidentiary hearing to determine whether the loss that the owner of the billboards suffered was substantial. 402 N.Y.S.2d at 367, 373 N.E.2d at 262.*

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* Examination of the jurisdictional statement filed in the Supreme Court indicates that the Court's dismissal "for want of substantial federal question," 439 U.S. 809, 99 S.Ct. 66, is not precedent for deciding the issue of the constitutionality of an amortization period in lieu of compensation. The dismissal simply affirmed the judgment remanding the

Contrary to Naegele's suggestion, *First English Evangelical Lutheran Church v. County of Los Angeles*, — U.S. —, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987), and *Nollan v. California Coastal Commission*, — U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), are distinguishable because they address significantly different taking issues. *First English* holds that a temporary regulatory taking that has already denied an owner all use of its property requires just compensation for the period during which the taking was effective. *See* 107 S.Ct. at 2389. *Hodel* held a statute unconstitutional because it escheated all of claimants' fractional interest in Indian allotments, abolishing devise and descent of the interests, without compensation. 107 S.Ct. at 2084. It is apparent, however, that the Durham ordinance does not deny Naegele all use of its property. Instead, like the statute upheld in *Keystone*, 107 S.Ct. 1232, it directly affects only a part of the property.

In *Nollan* the Court invalidated a requirement that the owner of beachfront property grant a public easement in order to obtain a permit to rebuild a dwelling on his lot. The condition requiring an easement violated the taking clause because it did not serve a governmental purpose related to the permit to rebuild. 107 S.Ct. at 3146-50. Here, in contrast, the prohibition of certain billboard advertising is directly related to the city's interest in aesthetics.

V

In summary, we hold that Durham's ordinance advances the legitimate city interest in aesthetics. The ordinance does not abridge Naegele's rights that are secured by the first amendment. We affirm the district court's judgment pertaining to these aspects of the case.

On remand the district court can proceed directly to the taking claim, determining first whether it is premature. If mature, the legitimacy of the taking depends on whether the ordinance denies Naegele "economically viable use" of an appropriate unit of its

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case without affirming the reasoning of the state court. *See Mandel v. Bradley*, 432 U.S. 173, 176-77, 97 S.Ct. 2238, 2240-41, 53 L.Ed.2d 199 (1977).

property. *See Keystone*, 107 S.Ct. at 1248-49. The appropriate unit is that one which is substantially affected by the ordinance. Its identification depends largely on the scope of Naegele's sharing contracts.

The district court should then canvass the facts that are necessary to address the inquiries identified in *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. The court should make findings pertaining to every aspect of Naegele's business that will be affected by the ordinance, including the number of billboards that can be economically used for noncommercial advertising, the number that are economically useless, the terms of Naegele's leases for billboard locations, the land Naegele owns for locations and whether it has any other economic use, the cost of billboards that cannot be used, the depreciation taken on these billboards and their actual life expectancy, the income expected during the grace period, the salvage value of billboards that cannot be used, the loss of sharing revenue, the percentage of affected signs compared to the remaining signs in Naegele's business unit, the relative value of affected and remaining signs, whether the amortization period is reasonable, and any other evidence presented by the parties that the court deems relevant.

The task we ask the district court to undertake is difficult. The Court recently summarized its importance as well as its complexity:

> A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized ... "this is a question of degree—and therefore cannot be disposed of by general propositions." ... To this day we have no "set formula to determine where regulation ends and taking begins." ... Instead, we rely "as much [on] the exercise of judgment as [on] the application of logic." ... Our cases have accordingly "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action—that have particular significance."

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348-49, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986) (citations omitted).

The judgment of the district court is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA DURHAM DIVISION

NAEGELE OUTDOOR ADVERTISING, INC., d/b/a Naegele Outdoor Advertising of Raleigh-Durham,

Plaintiff,

v. CIVIL NO. C-85-722-D

CITY OF DURHAM,

Defendant.

MEMORANDUM OPINION

BULLOCK, District Judge

On September 24, 1984, the City of Durham, North Carolina, banned advertising billboards from its jurisdiction effective five and one-half years after that date. Plaintiff Naegele Outdoor Advertising, Inc., a company that has thousands of billboards in several states, and hundreds throughout eastern and central North Carolina, has brought suit challenging the constitutionality and validity of the Durham sign ordinance, seeking declaratory and injunctive relief and damages. After extensive discovery, the case is now before the court on cross-motions for summary judgment. Finding no genuine issue of material fact, the court will grant Durham's motion and enter judgment in its favor, as the sign ordinance is a constitutional restriction on commercial speech on its face, has not been discriminatorily applied, and is otherwise a valid exercise of the City's police power.

I. FACTS

The record before the court presented by both parties shows the following facts to be essentially undisputed. Several years ago, the City of Durham stepped up its planning and zoning efforts in order to increase the attractiveness of the city to its residents, to

developers, and to newcomers to the Research Triangle area. As part of these efforts, the City Council passed an ordinance on February 21, 1983, which imposed spacing restrictions on advertising signs in certain zoning districts and prohibited all advertising signs from the C-3, or central business, district of downtown Durham. Durham, N.C., Ordinance No. 6078-B (Feb. 21, 1983). That ordinance required that downtown advertising signs made non-conforming by its passage be removed within five years. *Id.* Representatives of Naegele Outdoor Advertising, Inc. (hereinafter "Naegele") testified before the Durham City Council regarding the ordinance and participated in its formulation. Deposition of Donald Pierce, Vol. I at 175, Vol. II at 40-42. The validity and constitutionality of this ordinance is not in issue.

A year and a half later, the Durham City Council further amended its sign ordinance, and set up a regulatory scheme which Naegele now challenges. Durham, N.C., Ordinance No. 6452 (Sept. 4, 1984). The most dramatic aspect of this scheme was the prohibition of all advertising signs within Durham's jurisdiction, except for those on interstate and federally-aided primary highways, whose removal is regulated by federal and state law. In lieu of compensation to sign owners, the City granted an "amortization period" of five and one-half years, a period taken from a similar sign ordinance passed in Raleigh, North Carolina, and intended to allow sign owners to recoup some of the loss caused by the new prohibition.

Naegele soon after relayed to City attorneys that it considered the ordinance unconstitutional and would file suit to challenge it. When the ordinance remained unchanged, Naegele filed the present action on June 4, 1985. Shortly thereafter, Durham modified its sign ordinance, which modification had as its most important effect the exemption of "noncommercial" messages from the outright ban on advertising signs. Durham, N.C., Ordinance No. 6808 (June 19, 1985).

Understanding the Durham sign ordinance requires piecing together its various provisions and examining how the most recent

modifications either clarified or changed the law.[1] The basic plan of the ordinance, which was not changed by the June 1985 modifications, categorizes the signs within the city by purpose and by structure type. Certain purposes and structural types are prohibited in certain zoning districts. The spacing, aggregate area, and number of signs are restricted, with restrictions varying according to districts, structural type, and purpose. Durham, N.C., Code § 24-14 (1987).

Until the June 1985 amendments, the ordinance divided signs into four purpose categories according to their message content: advertising, business, identification, and incidental. The amendments added the fifth category of "noncommercial signs." An "advertising sign" is defined as

> [a] commercial[2] sign which directs attention to a business, commodity, service, or entertainment not conducted, sold, or offered on the premises where the sign is located or which business, commodity, service or entertainment advertised forms only minor or incidental activity upon the premises where the sign is displayed.

Id. § 24-14(B)(1) (1987). "Business signs" direct attention to a business or product on the same premises where the sign is displayed. *Id.* § 24-14(B)(2). "Identification" and "incidental" signs are both also "on-premises" signs and give such information as the name of a business firm, the address, and where to park. *Id.* § 24-14(B)(3) & (B)(4). A "noncommercial sign" is defined as a "sign which is not an advertising, business, identification, or incidental sign and which carries a substantive message, statement, or expression that is protected by the First Amendment to the United States Constitution." *Id.* § 24-14(B)(5).

After the September 1984 ordinance, all advertising signs were prohibited in all zoning districts, except those on interstate and

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[1] That portion of the Durham City Code regulating signs is attached to this opinion as an appendix.

[2] The word "commercial" was added by the June 1985 ordinance. Durham, N.C., Ordinance No. 6808 (June 19, 1985).

federally-aided primary highways. *Id.* § 24-14(F)(4). As noted, owners of these signs were given five and one-half years before the signs had to be removed. *Id.* § 24-14(X)(2).[3] After the June 1985 amendments, it was clear, if it had not been clear before, that noncommercial signs were not covered by the ban on advertising signs and would be permitted in all districts. *Id.* § 24-14(E)(10).[4] Those amendments also made clear that although noncommercial signs must meet the ordinance's requirements for structural type, number and size as permitted within the various zoning districts, *Id.*, a permit is not required to erect one, *id.* § 24-14(D)(2).[5]

II. DISCUSSION

A. Naegele's Motion for Summary Judgment

From these facts, Naegele derives a host of arguments to support its claim that the Durham sign ordinance is unconstitutional and invalid. The court's burden in addressing Naegele's arguments

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[3] That section provides:

> Nonconforming advertising signs. Any advertising sign made nonconforming by the adoption of this chapter, located adjacent to a highway other than a highway that is part of the national system of interstate and defense highways or the federal aid primary highway system, and authorized by a current and valid permit issued by the North Carolina department of transportation pursuant to the provisions of G.S. Chapter 136, Article II shall be removed within five and one-half (5-1/2) years from the date of the adoption of this subsection.

[4] Paragraph (E) of the Durham sign ordinance lists signs permitted in all districts. Subparagraph (10) of Paragraph (E) reads: "Noncommercial sign. Noncommercial signs shall comply with the regulations applicable to the use, district, and structural type. The maximum sign size, number of signs, and aggregate sign restrictions shall not be exceeded."

[5] That section provides: "Sign permit required. A sign permit, issued by the Director of Inspection Services shall be required for all signs except temporary signs not on the public right-of-way and those signs listed in section 24-14.E." Noncommercial signs are listed under § 24-14(E)(10).

is significantly lightened, for many of them were put forward and decided in Naegele's suit against the City of Raleigh, North Carolina, challenging a sign ordinance that also greatly restricted billboard advertising, in which suit the decision of the Eastern District of North Carolina upholding the constitutionality of Raleigh's ordinance was affirmed by the Fourth Circuit. *Major Media of the Southeast, Inc. v. City of Raleigh,* 792 F.2d 1269 (4th Cir. 1986), *aff'g* 621 F. Supp. 1446 (E.D.N.C. 1985), *cert. denied,* 55 U.S.L.W. 3571 (U.S. Feb. 23, 1987). Owing to the similarity of the Raleigh and Durham ordinances and of the arguments challenging both, the *Raleigh* case is dispositive of many of Naegele's points. Still, Durham's ordinance is sufficiently distinct to raise serious constitutional issues not addressed in *Raleigh.* As a consequence, a careful review of the case law and the facts of this case is in order.

1. Facial constitutionality

Naegele's chief argument is that the Durham sign ordinance abridges its and its customers' right to freedom of speech in violation of the first and fourteenth amendments. Naegele finds several faults in the ordinance, many of which implicate different branches of first amendment jurisprudence. Naegele alleges that Durham's disparate treatment of commercial and noncommercial speech amounts to prohibited content discrimination, and, as with the Raleigh ordinance, that its failure accurately to define "noncommercial" and "commercial" speech puts standardless discretion in the hands of city administrators and raises the spectres of prior restraint and censorship.

At the outset, the court notes that both of these arguments deal with the ordinance as it appears on its face. As there is no dispute as to what the ordinance says, the court is prepared to decide the actual controversy of its legal effect. Naegele, however, spends much time arguing and attempting to prove how the ordinance *will be applied.* Reams of deposition statements of city administrators are offered to prove that the ordinance will be interpreted to impinge on first amendment values, and will be used without adherence to sufficiently concrete standards. The fact is that the critical part of the ordinance has yet to be applied, as the restrictions which distinguish between commercial and

noncommercial speech will not be effective until 1990. Hence, any "as applied" argument is not yet ripe for adjudication, as not being based on an actual controversy, and any challenge must await such time as the City begins enforcement. *Raleigh*, 792 F.2d at 1271; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Thus the court treats only Naegele's challenge to the facial validity of the Durham ordinance.

Facial attacks on the constitutionality of an ordinance or statute may take either of two paths: first, the plaintiff may charge that the law is unconstitutional in every possible application, or second, the plaintiff may charge that the law is unconstitutionally over broad, and thereby restricts constitutional rights of parties not before the court. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). Where, however, the interests of third parties are no different from those of the plaintiff, this second route of attack, which is essentially an exception to normal rules of standing, is foreclosed. *Id.* at 801. As in *Taxpayers for Vincent*, the ordinance at issue here does not apply to any conduct more likely to be protected by the first amendment than Naegele's own signs. Naegele's interest in maintaining its signs is identical to that of its customers and other sign owners, whether their message be commercial or noncommercial. That is, "if the ordinance can be validly applied to [Naegele], it can be validly applied to most if not all of the signs of parties not before the Court." *Id.* at 802. Therefore, an argument that the Durham sign ordinance is "overbroad," which Naegele puts forth in its brief, is not appropriate, and whatever facial challenge Naegele may make to the ordinance must take the form that the ordinance may never be validly applied. *Id.* The court now turns to the arguments of the parties to determine whether such is the case.

a. Content discrimination

Naegele's first argument centers on the distinction the City's sign ordinance makes between commercial, off-premises signs (*i.e.*, advertising signs) and noncommercial signs wherever located. Under the ordinance, an off-premises billboard which carries an advertising message is banned in all districts, but the same billboard may remain if it carries a noncommercial message, and if its structure is otherwise consonant with zoning restrictions. That is,

according to Naegele, the City has banned certain signs based on the message they contain—advertising—but has not banned identical sign structures, large and intrusive to the environment though they may be, if they contain a noncommercial message. The effect of the sign ordinance, Naegele stresses, is to differentiate between given sign *messages,* and to favor one sort of message over another, and not to differentiate between sign types in a content-neutral way. Because the ordinance is not content-neutral, Naegele argues, it is not a time, place or manner restriction on speech, and consequently the City bears a difficult burden of showing that the ordinance directly serves a compelling state interest, and is the least restrictive means of doing so. The City cannot meet this burden, Naegele concludes, because the City's interests in aesthetic attractiveness and traffic safety are not served at all by permitting billboards with noncommercial messages to continue to dominate the landscape.

The City admits that the effect of the ordinance is to ban all off-premises sign structures carrying commercial copy. Sign structures carrying noncommercial messages will continue to be permitted. Durham contends, however, first that the distinction it draws between commercial and noncommercial messages is supported by the Supreme Court's decision in *Metromedia, Inc. v. City of San Diego.* Secondly, the City states that the ordinance is content-neutral in that it is not intended to impinge on the spread of any specific message, be it commercial or noncommercial, to promote or disadvantage a certain viewpoint, or even to stanch the flow of information in general, but is instead intended to regulate the manner of expression in a reasonable way in order to improve the quality of Durham life and traffic safety. Finally, the City argues that the ordinance rationally promotes these interests even though noncommercial billboards remain untouched, as it is a premise of the ordinance that the market for noncommercial messages spread by billboards is substantially smaller than that for commercial messages, making the economic reality of the ordinance such that the number of billboards remaining, once the ordinance takes full effect, will be substantially reduced.

The most significant case in this area of first amendment law is *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). In that case, San Diego had also banned off-premises advertising signs

completely, and had permitted on-premises commercial signs. The city, however, went further and prohibited noncommercial signs, both on- and off-premises, with several enumerated exceptions (such as for time and temperature signs, government-owned signs, and temporary political campaign signs). On these facts, a divided Supreme Court issued five opinions, producing a "law of billboards" which commentators have variously termed "unsatisfying and problematic," Blumoff, *After Metromedia: Sign Controls and the First Amendment*, 28 St. Louis U.L.J. 171, 183 (1984), and "confused," Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 244 (1982). The plurality opinion concluded first that San Diego could constitutionally prohibit all off-premises commercial advertising. 453 U.S. at 507. The plurality reasoned that the commercial speech at issue was accorded less protection than other constitutionally-guaranteed expression. *Id.* (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 [1980]). Under the four-part test set forth in *Central Hudson*, a restriction on commercial speech (1) that is not misleading or false will be upheld if (2) the restriction serves a substantial governmental interest, (3) it directly advances that interest, and (4) it goes no further than necessary to achieve its goals. *Id.* at 563-66. The *Metromedia* plurality, applying this test, found that there was little question that the city's interest in traffic safety and aesthetics was substantial and that the prohibition on off-site signs went no further than necessary to meet those goals. 453 U.S. at 507-08. Regarding the third *Central Hudson* criterion, the Court held that San Diego's legislative judgment that banning billboards directly served its interests in aesthetics and safety was not "manifestly unreasonable." *Id.* at 509. Thus the prohibition on off-site advertising signs was a valid restriction on commercial speech.

This result was not affected, the plurality held, by the fact that San Diego's restriction was "underinclusive," in that it permitted on-site advertising that was possibly just as distracting and ugly as the off-site variety. *Id.* at 511-12. This was so, the Court reasoned, because the prohibition on off-site signs still furthered the city's objectives, because the periodically changing nature of off-site signs may have presented more of a problem to traffic safety,

and because the city could reasonably conclude that interests supporting on-site advertising might outweigh the municipal interest in safety and aesthetics. *Id.* Accordingly, the distinction between on-site and off-site signs was reasonable and was let stand.

San Diego's restriction on noncommercial signs did not fare so well with the *Metromedia* plurality, however. The opinion reasoned that the Court's cases had consistently accorded more protection to noncommercial speech than commercial speech, but the San Diego ordinance had inverted first amendment values by permitting landowners to erect on-site commercial advertisements, but not expressions of a noncommercial nature. *Id.* at 513.

> The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Id.

The plurality found a further constitutional debility in the ordinance in its exceptions governing what kind of noncommercial speech could be posted. *Id.* at 514.

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. With respect to noncommercial speech, the

> city may not choose the appropriate subjects for public discourse . . .

Id. at 514-15 (citations omitted). As a result, the portion of San Diego's sign ordinance which forbade the display of noncommercial messages where commercial messages were permitted, and which excepted certain kinds of noncommercial speech, was unconstitutional.

Justice Stevens concurred in the plurality's opinion that the San Diego restriction on off-site commercial advertising was constitutional, but dissented with the plurality on the invalidity of the restrictions of noncommercial speech. *Id.* at 542 (opinion of Stevens, J., dissenting in part). Justice Stevens would have analyzed San Diego's ordinance as a complete ban on a form of communicative expression that would not leave open other channels of communication just as effective, thus making it unsustainable as a reasonable time, place and manner restriction. *Id.* at 549. Still, Justice Stevens would have upheld the ordinance as a legitimate exercise of the city's interests in improving the quality of life because the ordinance was not biased in favor or against one point of view, and because the availability of other modes of expression both popular and unpopular remained ample. *Id.* at 552. Similarly, both Chief Justice Burger and Justice Rehnquist, dissenting separately, would have upheld the ordinance in its entirety, as its restrictions were viewpoint-neutral and served a substantial governmental interest. *Id.* at 555, 569.

Metromedia, taken as a whole, thus stands for the proposition that a city may distinguish commercial and noncommercial signs, and may ban off-site commercial signs entirely. As Chief Justice Burger pointed out, what a city may do with noncommercial signs is not so clear, as the plurality opinion may fairly be read either to permit a complete ban on off-site noncommercial signs or to forbid any restriction on noncommercial signs at all. *Id.* at 564. Implicit, however, in the plurality's holding, and explicit in the opinions of three other justices, was that commercial and noncommercial speech may be treated differently. As the plurality stated, "recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." *Id.* at 513. To give more protection to one class of speech than to

another is of course to discriminate on the basis of "content." But that sort of discrimination is permitted, at least in the commercial vs. noncommercial speech context, and indeed required, if the first amendment is to distinguish between protected and unprotected speech, and therefore have any meaning. *See* Stephan, *The First Amendment and Content Discrimination,* 68 Va. L. Rev. 203, 231-36 (1982). More recent cases have made clear that the kind of content discrimination that gives rise to the strict scrutiny and presumption of unconstitutionality sought by Naegele is "viewpoint discrimination," that is, an attempt to suppress or bias a certain point of view. *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 49 (1983).

Applying these principles to the instant case, the court finds that the Durham ordinance easily withstands constitutional examination. Its prohibition on all off-premises advertising signs was expressly approved in *Metromedia.* That decision's admonition that noncommercial speech should be accorded as much or more variety of outlets as commercial speech is reflected in Durham's provision permitting noncommercial signs to remain in all districts, even if the same sign would be prohibited with a commercial message. This "content discrimination" does not seek to promote one viewpoint over another, or even to promote one class of speech over another, but merely classifies kinds of speech in order to provide each with the proper degree of protection. Thus, Naegele's argument that the Durham ordinance is not content-neutral, and therefore presumptively unconstitutional, must fail.

Moreover, the court believes that Durham's ordinance should properly be judged under traditional time, place and manner analysis rather than the more stringent commercial speech analysis. The time, place and manner approach usually takes the formulation that a content-neutral restriction on the time, place or manner of expression is acceptable so long as it serves a substantial governmental interest and does not unreasonably limit alternative avenues of communication. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984). The plurality in *Metromedia* rejected such an analysis in that case as San Diego's ordinance was held not to be content-neutral and because the parties had stipulated that alternative channels of advertising were inadequate. Yet, in

fact, the standard the plurality applied in judging San Diego's sign ordinance much more resembled the deferential time, place and manner test than the commercial speech test the plurality claimed to use, which entailed an inquiry into whether the chosen means directly serves the governmental interest and is the least restrictive of possible means. Addressing the question of whether the ordinance "directly advanced" governmental interests, the plurality said,

> We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. . . . It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'aesthetic harm.'

Id. at 509-10. *See* Meiselman, *The Regulation of Outdoor Advertising: Balancing Freedom of Speech and Aesthetics*, 1985 Ann. Surv. Am. L. 671, 674 & n.23 (arguing that the *Metromedia* plurality used an "intermediate" standard of review in judging San Diego's restriction on commercial speech, more permissive than that associated with content-based restrictions).

The apparent confusion over what standard governs ostensibly content-based restrictions on the time, place, and manner of speech, such as San Diego's sign ordinance, was substantially cleared up in the Court's last term. In *City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 89 L. Ed. 2d 29 (1986), the Court considered a zoning ordinance which restricted the location of adult movie houses within the town through spacing and setback provisions, very much like the ordinance considered in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Even though the local ordinance discriminated between movie houses based on the content of the films they displayed, the Court held that the ordinance was properly judged under time, place and manner analysis, affirming the plurality decision of *American Mini Theatres*. *Id.* at _____, 89 L. Ed. 2d at 37. The Court in *Renton* made a distinction, relevant to the instant case, between regulating the content of speech, and regulating the secondary effects of certain types of speech:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community.

Id. (emphasis original). The "predominate concern" of the Renton zoning ordinance was with attempting "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of neighborhoods, commercial districts, and the quality of urban life,'" aims unrelated to the suppression of "the expression of unpopular views." *Id.* at ____, 89 L. Ed. 2d at 38.

> In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.' *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. *748, 771 (1976) (emphasis added). The ordinance* does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.' [*Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)].

Id. Consequently, the Court judged the Renton ordinance as a time, place and manner restriction justified by the different secondary effects different sorts of speech may have.

Durham's ordinance, similarly, makes distinctions based on the content of a given sign not to suppress the expression of its message but to regulate its secondary effects. The purposes of the sign ordinance are

> to minimize any detrimental effects of signs on adjacent properties; to prevent advertising, business, and identification signs for [sic] conflicting with or obscuring signs related to the public safety, . . . and to maintain and enhance the aesthetic environment and the community's ability to attract sources of economic development and growth.

Durham, N.C., Code § 24-14(A) (1987). These purposes are essentially unrelated to the suppression of unpopular views or ideas. *Id.*; *Taxpayers for Vincent*, 466 U.S. at 805. The ordinance attempts instead to address the aesthetic harm advertising billboards do to the urban environment and the potential distraction they present to the motoring public, secondary effects very similar to those Renton sought to address in cabining adult theaters. *Renton*, — U.S. at —, 89 L. Ed. 2d at 38. Under the rationale of that case, the court will treat Durham's ordinance as a time, place, and manner restriction on speech justified without regard to content, and will inquire whether it is designed to serve a substantial governmental interest and leaves alternative avenues of communication reasonably ample. *Id.* at 39.

There can be no question that a city's concerns in maintaining and enhancing the quality of its environment through aesthetic regulation, and in improving traffic safety, are substantial governmental interests. *Id.* "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. at 71. Indeed, the interest in aesthetic improvement is alone sufficient to justify a significant restriction on the manner of expression. *Taxpayers for Vincent*, 466 U.S. at 807. Paraphrasing *Vincent*, the visual assault on the citizens of Durham presented by the billboards at issue here constitutes a significant substantive evil within the City's power to prohibit. *Id.*

As to whether alternative channels of communication remain available, the ordinance leaves the medium of billboards completely open to noncommercial expression, thereby making inquiry into what alternatives exist for this category of speech unnecessary—the total quantum of available media remains the same. Naegele suggests, however, that the volume of noncommercial speech

carried by billboards will be reduced, as it now provides space on many of its signs to public interest groups free of charge, which service it will be unable to subsidize without a robust commercial advertising trade. However, this does not change the fact that the medium remains available to those noncommercial advertisers willing to pay for it. Naegele's private policy in donating sign frontage to noncommercial groups is a product of its own design, not the City of Durham's, and the City does not have to subsidize this policy itself by tolerating the profusion of commercial signs throughout the city. Whether owners of signs donate them to certain groups or demand payment is not affected by the sign ordinance, and any reduction in the amount of noncommercial billboard expression "derives from the decisions of the individual property owners" and not from the Durham ordinance. *Raleigh*, 792 F.2d at 1273. Neither is there constitutional infirmity in making noncommercial expression pay what the market demands for a given medium: "[W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Renton*, — U.S. at —, 89 L. Ed. 2d at 42. Thus, the court concludes that available channels for non commercial expression remain as ample in Durham now as they were before Durham's sign ordinance was passed.

With respect to alternate channels of commercial expression, the court is satisfied that advertisers in Durham will retain the benefit of a considerable variety of available advertising media after this ordinance takes full effect. Commercial billboards along interstate and primary U.S. highways, not an insignificant portion of the total now in existence (in Naegele's case, 82 sign faces out of a total of 213, or roughly 38%, Plaintiff's Exhibit 5A), remain unaffected by the ordinance. Newspapers, radio, and television continue to give commercial advertisers a wide audience, and other avenues, such as handbilling, telephone directories, and solicitation through the mails, round out what appears to be a healthy trade in hawking one's wares.[6] These methods of advertising may not be

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[6] Naegele relies on *Metromedia*'s plurality to argue that alternative means of advertising are unsatisfactory to billboard advertisers. *See*

as "cost-effective" for many advertisers, but again, "free speech" is not to be equated with "cheap speech;" that is, the Constitution does not guarantee advertisers a bargain when they advertise. *Renton*, — U.S. at — 89 L. Ed. 2d at 42. Thus the court concludes that under Durham's ordinance reasonable alternative channels of communication remain open to commercial and noncommercial speakers alike.

Naegele argues, nevertheless, that even given the availability of alternative means of communication and Durham's substantial interest in regulating advertising signs, the restriction on billboards must fail because the ordinance is not "narrowly tailored" to serve those interests. Naegele here points to the fact that under the ordinance billboards may be just as numerous and large as they are now, as long as they carry noncommercial copy, in which case Durham's interests are not served at all. In the same vein, Naegele argues that sign structures are not immutably linked to sign messages, and a blanksign, equally as unattractive and hazardous as one carrying message, will not be treated by the ordinance, thereby making irrational.

On these points, the court cannot agree. First, the requirement that a restriction on the time, place, and manner of speech be "narrowly tailored" does not mean that the restriction be *effective*, but rather means that it not unnecessarily sweep other, unproblematic speech or conduct into its scope. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). Such a restriction might be, for example, prohibiting all signs, of whatever type, size or location, in an attempt to deal with the perceived eyesore of billboards. What Durham has done is just the opposite.Its ordinance is, in fact, quite tailored to treat only the problem of

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Metromedia, 453 U.S. at 516. The plurality's dictum on this point was founded largely on the stimulation in that case that "other forms of advertising are insufficient, inappropriate and prohibitively expensive." *Id.* There is no such stipulation here. In addition, as the existence of alternative advertising channels is indisputable and generally known or ascertainable, the court can take judicial notice of what those alternatives are. Fed. R. Evid. 201. Whether these alternatives are reasonably ample is a legal question, which the court decides in the affirmative.

commercial billboard advertising, and goes no further than necessary to solve that problem by leaving non commercial displays unrestricted.

Secondly, even if the secondary effects of noncommercial signs should prove as significant a problem as those of commercial signs, it is not up to the court to judge the wisdom of prohibiting only those signs which have proven their obnoxiousness in the City Council's view. Durham may contend with other sign problems as they arise without the benefit or hindrance of this court's prejudgment. "[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U.S. at 71, *quoted in Renton*, — U.S. at —, 89 L. Ed. Id at 41. Should Durham in the end prefer to give noncommercial signs such free rein that its aesthetic and traffic safety goals are subverted, that may very well reflect Durham's decision that its municipal interests yield to the interest in a healthy exchange of ideas. *See Metromedia*, 453 U.S. at 512 (municipal interests may reasonably yield to the interest in on-site commercial signs). In any event, the court is unwilling to presage the practical effect of the ordinance's distinctions.

Thirdly, if Naegele's argument here is taken as disputing the rationality of Durham's scheme, an argument it makes expliciting other parts of its brief, it is also unavailing. There is nothing irrational about presuming that noncommercial interests willing to pay for billboard advertising are significantly less plentiful than their commercially-motivated brethren.[7] Naegele's suggestion that this presumption is somehow invidious has no merit. It is simply a statement of common sense. It follows from this presumption that many fewer billboards will remain standing after the ordinance's prohibition on advertising signs is effective. As for blank signs, the ordinance provides that signs carrying obsolete copy shall be removed within sixty days, effectively dealing with

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[7] Naegele, in fact, admits that many of the public service messages which it now posts on behalf of noncommercial groups are not paid for but are donated by Naegele free of charge. Deposition of Donald Pierce, Vol. I at 147.24

the intrusive-sign structure problem. Durham, N.C., Code 24-14(D) (7) (1987).

Thus, altogether, the Durham sign ordinance is a reasonable restriction on the time, place, and manner of speech, that rationally and directly serves substantial governmental interests.Naegele's facial attack on Durham's ordinance on this score will therefore be dismissed.

b. Vagueness and prior restraint

Naegele's second facial attack to the Durham ordinance's constitutionality charges that it permits City administrators to differentiate between commercial and noncommercial signs, and therefore between permitted and unpermitted speech, without standards and prior to a sign's posting, thereby giving administrators the power of the censor and chilling protected speech.

These arguments were raised by Naegele in its suit against Raleigh, and were dismissed by the Fourth Circuit. *Raleigh*, 792 F.2d at 1272-73. As in that case, the standards Durham administrators will apply in determining what speech is commercial or noncommercial have been amply described by the courts. *Id.* at 1272. The Supreme Court has defined commercial speech as "expression related solely to the commercial interests of the speaker and its audience." *Central Hudson*, 447 U.S. 557, 561 (1980). While Naegele has presented proof that some City administrators will have difficulty drawing the line between the two types of speech, that does not alter the fact that the ordinance on its face provides adequate standards for them to follow.

> Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by court decisions in the area.

Raleigh, 792 F.2d at 1272-73. In addition, the problem of distinguishing commercial from noncommercial speech is ameliorated in Durham's case because no permit, and therefore no

prior review, is required for noncommercial signs. Durham, N.C., Code § 24-14(D) (2) (1987). Conformity with the ordinance's requirements therefore will be determined after the sign is put up, thereby reducing the danger that noncommercial sign displayers will be constrained in their expression.

Thus, the court concludes that Durham's sign ordinance does not on its face put standardless discretion in the hands of administrators, nor does it constitute a prior restraint. As previously noted, the question of whether the ordinance will be constitutionally applied must await whatever challenge future sign owners may bring.

2. Validity of the ordinance before June 1985

Naegele's final argument in its summary judgment motion is directed to the validity of the Durham sign ordinance as it existed before the Durham City Council amended its provisions June 19, 1985. Naegele's contention is that from September 4, 1984, until June 19, 1985, the ordinance was a clear violation of the principles set forth in *Metromedia*, in that the ordinance favored commercial over noncommercial speech, entitling Naegele to a declaration of the ordinance's invalidity at that time and a grant of attorney's fees and costs.

The short answer to Naegele's argument here is that this controversy is moot. The court has already held that the ordinance, as amended through the present, is constitutional. Naegele asks the court to ignore the fact of the June 1985 amendments to declare that the ordinance used to be unconstitutional. But a question which has become moot by the passage of a statute obviating the controversy is not justifiable by federal court. *United States v. Alaska Steamship Co.*, 253 U.S. 113 (1920); *Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 777 F.2d 598 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1973 (1986). In addition, a court should refrain from deciding constitutional issues unless required by the case or controversy before it. *Id.* (citing *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 [1947]). Even if the June 1985 changes affected the constitutionality of the sign ordinance, a question which the court does not decide, the issue of the ordinance's validity at that time presents a controversy

no longer in existence.[8] Consequently the issue is moot, and the court will decline Naegele's offer to decide the status of Durham's earlier ordinance.

B. Durham's Motion for Summary Judgment

Durham has moved for summary judgment against Naegele as to each of its claims that the Durham sign ordinance is invalid. Under Naegele's motion, which sought judgment only on its first amendment arguments, the court decided that the sign ordinance was not unconstitutional for any of the reasons Naegele put forth. Accordingly, judgment can be granted in Durham's favor on those grounds. The court now turns to the rest of Naegele's arguments stated in its complaint to determine whether summary judgment maybe entered against Naegele on these points as well.

1. Taking without just compensation

Naegele contends that the Durham sign ordinance, which requires advertising sign owners like Naegele to remove their signs by March 4, 1990, effects a taking of its property without just compensation, in violation of the fifth and fourteenth amendments. In its complaint, Naegele alleges that those of its signs affected by the Durham ordinance will be rendered economically useless, meaning a loss to it of some $1.5 million, according to its appraiser. Appendix to Plaintiff's Motion for Summary Judgment, Exh. 28 at I. Naegele states further that it will lose revenue on the remaining signs in its "system" as it will no longer be able to offer as wide a "showing" to its customers. Against these losses, it continues, Durham's amortization period of five and one-half years does not approach just compensation.

In its response to Durham's motion for summary judgment, Naegele argues mainly that Durham has not shown the absence of a genuine issue of material fact, therefore the issue of a "taking"

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[8] Although Naegele asked for both a declaratory judgment and damages in its complaint, under this part of its argument it asks only for declaratory relief. Plaintiff's Memorandum in Support of its Motion for Summary Judgment at 40. It has also not shown the court that the ordinance as it stood before June 1985 caused it any injury. Absent such injury, the controversy ceased when the ordinance was amended.

here is not appropriate for summary judgment. However, the court is satisfied that Durham has amply supported its motion and that there is little doubt as to how its sign ordinance will restrict Naegele's signs. Durham having met this initial burden, it is now incumbent on Naegele to "set forth specific facts showing that there is a genuine issue for trial," and it "may not rest upon the mere allegations or denials of [its] pleading." Fed. R. Civ. P. 56(e). Naegele, in fact, has not shown the court what facts surrounding the taking issue remain in controversy.[9] Indeed, to the court, all of the pleadings, depositions, and affidavits show no genuine issue regarding the regulatory operation of the Durham ordinance. With the factual setting clear, the only question here is whether the legal effect of Durham's sign ordinance amounts to the taking of private property for public use without just compensation, a question of law which the court can decide. *Raleigh*, 621 F. Supp. at 1452. On this question, Naegele bears the burden of proof. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. —, —, 91 L. Ed. 2d 285, 294 (1986).

While an exercise of the police power which has economic effects usually will not be construed to take private property, a government regulation can constitute a taking if it "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In determining when a regulation "goes too far," the Supreme Court "[t]o this day [has] no 'set formula to determine where regulation ends and taking begins.'" *MacDonald, Sommer & Frates*, 477 U.S. at _____, 91 L. Ed. 2d at 294 (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 [1962]). Instead, the Court has identified and analyzed several factors to balance the economic injuries to private property owners against the public good, id.,an analysis that requires "essentially ad hoc, factual inquiries," *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1977). These factors include "the economic impact on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;" and "the

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[9] Naegele does argue that the reasonableness of Durham's amortization period is a question of fact still in issue, but merely alleging "unreasonableness" without showing a factual foundation for that claim is not enough to create a triable issue of fact. *Raleigh*, 792 F.2d at 1274.

character of the governmental action, "for example, whether it is, on the one extreme, an actual "physical invasion," or, on the other, a "program adjusting the benefits and burdens of economic life to promote the common good." *Id.*; *see also MacDonald, Sommer & Frates*, 477 U.S. at —, 91 L. Ed. 2d at 294; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

In *Penn Central*, the Court held that a landmarks designation law, which severely restricted the development capability of historic sites, did not take development or airspace rights from the owners of Grand Central Terminal in violation of the fifth amendment. 438 U.S. at 138. Though the restriction in that case did not forbid the then-current uses of the Terminal, it did forbid the use of a right inherent in the property, *i.e.*, the right to build into the Terminal's airspace. The restriction of this right was compensated, at least in part, the Court held, because airspace development rights could be transferred to other parcels in Manhattan owned by Penn Central. *Id.* at 137.

Other Supreme Court cases have treated significant governmental restrictions on the use of private property in similar fashion. In *Miller v. Schoene*, 276 U.S. 272 (1928), a case cited with approval by the *Penn Central* court, a Virginia law required a landowner to fell ornamental red cedar trees on his property to protect nearby cultivated apple trees from the fatal cedar rust parasite. The landowner was not compensated for the value of the standing timber nor the decrease in market value of the realty caused by its destruction, but he was paid $100.00 to cover the expense of the trees' removal. *Id.* at 277. He was also permitted to keep the felled trees for his own use or for sale. *Id.* Under these circumstances, the Court held, the statute requiring destruction does not effect a taking, as the state could legitimately prefer one class of property of significant importance to the economic health of the state, *i.e.*, apple orchards, over another class of insubstantial public value. *Id.* at 279.

> It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a

> preponderant public concern in the preservation of the one interest over the other. And when the public interest is invoked preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.

Id. at 279-80 (citations omitted).

More recently, in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court held that an ordinance forbidding mining below the water table, which acted to put a sand and gravel mining company out of business, did not go too far, as the ordinance was a legitimate exercise of the police power and the mining company retained the value of its mined land, which value did not decrease as a consequence of the ordinance. Because the owner still had reasonable use of the property, and because the restriction served a substantial public purpose, the Court thus held no taking had occurred. *Id.* at 594; *see Penn Central*, 438 U.S. at 125-27 (analyzing holdings of both *Miller* and *Goldblatt*).

As with Virginia's treatment of the red cedar trees in *Miller*, Durham has decided that the private interest in bill board advertising must fall to the public interest in traffic safety and aesthetic beauty, interests the Supreme Court has acknowledged to be "substantial." *Metromedia*, 453 U.S. at 507-08. Durham does not forbid Naegele from taking its signs elsewhere to be put to their full economic use. Thus the property right which Naegele complains is being taken from it—the use of its signs on the public streets—may be transferred to other places where billboards remain legal, including within Durham on the interstate and primary U.S. highways, should zoning restrictions allow. Naegele's retained ability to transfer its right of use substantially ameliorates the economic effect of the governmental restriction. *Penn Central*, 438 U.S. at 137. Indeed, *Penn Central's* analysis argues that the Durham ordinance does not constitute a compensable taking at all, *id.*, except to the extent of Naegele's cost of removing its signs, *see Miller v. Schoene*, 276 U.S. at 272. On this score, the Durham ordinance, by giving Naegele five and one-half years to maintain its signs when it could have prohibited them immediately, granted

Naegele a five and one-half year stream of income payments, a stream which has a calculable, significant value.

Moreover, a review of the cases which have applied fifth amendment principles to the question of whether a prohibition on billboards constitutes the taking of private property shows conclusively that such a prohibition, coupled with a reasonable amortization period, is not unconstitutional. The leading case is *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977). There, the New York Court of Appeals held that a prohibition on billboards in two state parks, which provided for a six and one-half year amortization period, was not an unconstitutional taking. The court believed that no amortization or compensation would be required if the signs were prohibited as a threat to public safety. *Id.* at 477-78, 402 N.Y.S.2d at 365, 373 N.E.2d at 260. But because the justification relied on in that case was only aesthetics, the court believed an immediate ban would have been unreasonable: "[A]bsent the urgency present in a safety-motivated regulation, the immediate benefit gained does not outweigh the loss suffered by those individuals adversely affected." *Id.* at 478, 402 N.Y.S.2d at 366, 373 N.E.2d at 261. Consequently, the court approved amortization not as a constitutional requirement but as a "middle ground" between "an individual's interest in maintaining the present use of his property and the general welfare of the community sought to be advanced by the zoning ordinance." *Id.* at 479, 402 N.Y.S.2d at 366, 373 N.E.2d at 261. To be upheld, such an amortization period need only be reasonable in light of the investment, and while it need not be of such duration so as to permit the owner to recoup his investment entirely, it should not be so short as to result in a substantial loss. *Id.* at 479-80, 402 N.Y.S.2d at 367, 373 N.E.2d at 262. As the facts in that case were insufficiently described to permit the court to determine whether a six and one-half year amortization period was reasonable, the court remanded for further taking of evidence. *Id.* at 481, 402 N.Y.S.2d at 368, 373 N.E.2d at 262-63.

Closer to home, several courts have found a five an done-half year amortization period to give billboard owners a reasonable opportunity to ameliorate the loss suffered by a restrictive billboard law. *See Raleigh*, 621 F. Supp. at 1452-53; *R. O. Givens, Inc. v.*

Town of Nags Head, 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982).

The *Modjeska* result has also been approved in many other states. *See Salinas v. Ryan Outdoor Advertising, Inc.*, No. A-012721 (Cal. Ct. App. Feb. 13, 1987) (available on Westlaw) (upholding five-year period as reasonable); *Lamar Advertising Associates of East Florida, Ltd. v. City of Daytona Beach*, 450 So.2d 1145 (Fla. Dist. Ct. App. 1984) (upholding ten-year period as reasonable); *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 497, 162 N.W.2d 206 (1983) (upholding three-year period); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex. Civ. App. 1978) (upholding five-year period).

Naegele has shown the court no reason to believe Durham's five and one-half year amortization period is any less reasonable than the ordinances in the cases just cited. As the Eastern District pointed out, many shorter amortization periods have been held reasonable. *Raleigh*, 621 F. Supp. at 1452. Naegele's only support for its position that the amortization period is unreasonable is the affidavit of an expert appraiser, who has estimated the fair market value of Naegele's affected signs. Appendix to Plaintiff's Motion for Summary Judgment, Exh. 38. To be "reasonable," however, an amortization period does not have to permit the sign owner to realize a sign's potential future income, as long as he can "recoup some of his investment," *id.* at 1453, or he can avoid a "substantial loss," *Modjeska*, 43 N.Y. at 480, 402 N.Y.S.2d at 367, 373 N.E.2d at 262. By granting Naegele a five and one-half year stream of income payments from its signs, Durham permitted Naegele to avoid such a loss.

The Supreme Court's decisions on "regulatory takings" show that Durham's prohibition on advertising signs does not constitute a "taking," as it is a legitimate preferment of substantial public interests over private commercial interests, that nevertheless leaves sign owners the ability to transfer the right to use their signs in other places. The state cases considering the reasonableness of amortizing billboards show that Durham's five and one-half year amortization period is not an unreasonable way to compensate sign owners for the cost of the removal of their signs. Consequently, the Durham sign ordinance does not take private property without

just compensation, and this part of Naegele's claim will be dismissed.

2. Remainder of Naegele's claims

The balance of Naegele's arguments may be treated more summarily. Naegele requests in its complaint that the court declare the Durham sign ordinance to exceed the power and authority conferred upon the City under North Carolina law. On the City's motion for sutunary judgment, Naegele has presented no evidence, nor has it presented any argument in its brief, which shows this claim to have any merit. Durham, on the other hand, shows that the North Carolina General Statutes grant it the authority to restrict structures as part of its zoning power:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, any city is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence for other purposes.

N.C. Gen. Stat. § 160A-381 (1982). The North Carolina Court of Appeals has held a sign ordinance similar to Durham's falls within the zoning power. *R. 0. Givens, Inc. v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982). The North Carolina Supreme Court has also held amortization to be an appropriate means of treating non-conforming uses. *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975). Thus, there being a complete failure of proof that Durham's sign ordinance exceeds the City's grant of power in any measure, Naegele's claim to that effect must be dismissed.

Similarly, Naegele's complaint charges that the Durham ordinance is not a valid exercise of the City's inherent police power, as it does not rationally further any legitimate state interest. In considering the constitutionality of the ordinance, however, the court has already determined that the restriction on advertising

signs directly furthers the substantial governmental goals of traffic safety and aesthetic enhancement of the environment. That determination necessarily includes the finding that those goals are legitimate and are rationally served. Therefore, this argument also must fail.

In short, Naegele has shown the court no reason why any of its subsidiary challenges to Durham's sign ordinance have any substance. Where the non-moving party so fails to present evidence as to essential elements of his claim on which he has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. —, 91 L. Ed. 2d 265 (1986). As a consequence, Durham's motion for summary judgment as to these claims, and as to the whole of Naegele's complaint, will be granted.

III. CONCLUSION

For the foregoing reasons, Naegele's Motion for Summary Judgment will be denied, the City of Durham's Motion for Summary Judgment will be granted, and this action will be dismissed.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

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United States District Judge

April 2, 1987

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[FILED April 5, 1994]

No. 92-2321
CA-85-722-D

NAEGELE OUTDOOR ADVERTISING, INCORPORATED,
d/b/a Naegele; Outdoor Advertising Company of Raleigh-Durham

Plaintiff-Appellant

v.

CITY OF DURHAM

Defendant-Appellee

THE SOUTHERN ENVIRONMENTAL LAW CENTER; NATIONAL TRUST FOR HISTORIC PRESERVATION; NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS; AMERICAN PLANNING ASSOCIATION

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

APPENDIX F

Sec. 24-14 SIGNS

A. PURPOSES.

The purposes of these sign regulations are to encourage the effective use of signs as a means of communication in the City; to maintain and enhance the aesthetic environment and the community's ability to attract sources of economic development and growth; to eliminate physical and visual clutter; to improve pedestrian and traffic safety; to minimize the possible adverse effects of signs on nearby public and private property; and to enable the fair and consistent enforcement of these sign restrictions.

B. APPLICABILITY. SIGN DEFINED.

For purposes of this Section, a sign is any device, fixture, placard, or structure which uses any color, form, graphic, illumination, symbol, or writing to advertise, announce the purpose of, or identify the purpose of a person or entity, or to communicate information of any kind to the public.

The sign regulations included in this Section 14 shall apply to all signs which are not public signs or which are located on private property within the territorial limits of the City of Durham. A sign on a vehicle, trailer or equipment parked or located for purposes of displaying the sign shall be a sign subject to regulation under this Section, unless said vehicle is used in the normal day-to-day transportation of goods and services of the business.

The effect of this Section 14, as more specifically set forth herein, is:

To, establish a permit system to allow a variety of types of signs on business premises and a limited variety of signs on other premises, subject to the requirements of this ordinance and subject to the permit procedures of this Section;

To allow certain signs which are small, unobtrusive and incidental to the principal use of a site subject to the substantive requirements of this ordinance but without the requirements for permits;

To prohibit off-premises advertising signs, except where regulation is controlled by state and federal law;

To allow a variety of types of noncommercial signs subject to the same substantiative and permit requirements that control on-premises commercial signs;

To allow certain types of signs in certain locations to make minor encroachments on the public right-of-way, subject to special permit requirements;

To prohibit all signs not expressly permitted by this ordinance;

To provide for the enforcement of the provisions of this Section.

C. EXEMPTIONS

The following shall be exempt from regulation under this ordinance, regardless of whether they may be considered "signs"

1. Any municipal traffic control or other public sign;
2. Any public notice or warning required by a valid and applicable federal, state or local law, regulation or ordinance;
3. Works of art which do not identify a business, product, or service;
4. Holiday lights and decorations with no commercial message displayed between November 15 and January 15.

D. SIGNS NOT REQUIRING SIGN PERMITS.

The following may be erected without a sign permit, regardless of whether they may be considered "signs." Signs which do not meet the criteria listed below must comply with all of the sign ordinance requirements applicable to the lot on which the sign is to be located including area, height, number and location.

1. Any sign not legible from any public right-of-way or from any lot or parcel of land other than the lot or parcel on which such sign is located or an adjacent lot or parcel under common ownership with the lot or parcel on which

such sign is located. Such sign shall not exceed 6 feet in height, if freestanding, and 32 square feet in area regardless of structural type. If such sign is placed in or on a window visible from public right-of-way or adjacent property, the aggregate of all signs in or on the window shall not exceed 20% of the total window area. Permanently mounted information signs for drive-thru businesses are included as part of this category; however, any logos or promotional pictures shall be counted as part of the overall sign area for the property.

2. Temporary signs placed on or in windows provided such signs, in combination with other window signs, do not exceed 20% of the window area and provided such signs in combination with all other signs on the lot do not exceed the maximum permitted sign area for the lot.

3. Signs which do not exceed 3 square feet in area per sign that are customarily associated with residential use, such as (i) signs giving property identification names or numbers or names of occupants (ii) signs on mailboxes, and (iii) signs posted on private property relating to private parking, no trespassing or dangerous animals. A sign identifying a home occupation must be a wall sign and is limited to 3 square feet in area and one per lot.

4. Flags of the United States, North Carolina, the City of Durham, foreign nations having diplomatic relations with the United States, and any other flags adopted or sanctioned by an elected legislative body of competent jurisdiction, provided such a flag shall not exceed 60 square feet in area and shall not be flown from a pole the top of which is more than 40 feet in height. These flags must be flown in a manner which meets U.S. Congressional protocol. Failure to display flags in a manner which meets Congressional protocol will be a violation of this section. All other flags are considered banner signs, and must comply with the sign ordinance for area, height, number and location.

5. Historic and memorial markers. Such signs which are cut into a masonry surface or are not constructed of bronze

or similar materials shall not exceed 3 square feet in area and are limited to 1 per lot.

6. Traffic control signs on private property, such as "stop", "yield" and similar signs, the face of which meet Department of Transportation standards and which contain no logo or commercial message of any sort and which do not exceed 8 square feet in area per sign.

7. Incidental signs which do not exceed 3 square feet in area per sign.

8. Yard sale signs which do not exceed 6 square feet in area, are limited to 1 per lot, and are removed within 1 day of the event.

9. Vending machines or gasoline pumps which display the name, trademark or logo of the company, brand or price information provided the display area is an integral part of the machine or pump and does not exceed 32 square feet in area per side.

10. Construction signs in residential districts which do not exceed 6 square feet in area and 6 feet in height, which are limited to 1 per lot, and which are removed prior to the issuance of a Certificate of Occupancy.

11. Construction signs in nonresidential districts which do not exceed 32 square feet in area and 8 feet in height, which are limited to 1 per lot, and which are removed prior to the issuance of a Certificate of Occupancy.

12. Real estate signs in residential districts which do not exceed 6 square feet in area per sign, which do not exceed 6 feet in height for freestanding signs, and which are limited to 1 freestanding sign per street frontage and 1 wall sign per dwelling unit.

13. Real estate signs in nonresidential districts which do not exceed 32 square feet in area per sign, which do not exceed 8 feet in height for freestanding signs, and which are limited to 1 freestanding sign per street frontage and 1 wall sign per building facade if the entire building is for

sale or lease or 1 wall sign per leasable area if subunits of the building are for lease or rent.

14. Announcements by public or nonprofit organizations of special events or activities of interest to the general public, provided such signs do not exceed 6 square feet in area for residential uses in residential districts, 25 square feet in area for permitted nonresidential uses in residential districts, and 32 square feet in area for nonresidential districts, are limited to 1 sign per site of such events, are erected no sooner than two weeks before the event, and are removed within 7 days after the event.

15. Temporary political signs erected in connection with elections or political campaigns provided such signs are removed within 7 days following the election or conclusion of the campaign and provided that in residential areas such signs do not exceed 6 square feet in area per sign and 6 feet in height for freestanding signs; and that in nonresidential areas such signs do not exceed 32 square feet in area per sign and 8 feet in height for freestanding signs.

E. PROHIBITED SIGNS.

The following signs are prohibited:

1. Strings of lights not permanently mounted to a rigid background, except those used under Subsection 24-14.C. *Signs not Requiring Sign Permits*.

2. Signs with animated, blinking, chasing, flashing, or moving effects except when such signs are located in the C-3 district provided that this provision shall not prohibit a display of time or temperature which blinks, flashes or moves simply to change the time or temperature or to alternate between time and temperature displays;

3. Rotating or revolving signs;

4. Pennants, except those qualifying as "Banners;"

5. Portable signs;

6. Off-premises signs, except for those existing on September 4, 1984, which are located along U.S. Interstate highways or federal aid primary highways and. which are maintained in compliance with applicable state regulations;

7. Obsolete signs;

8. All other signs which are not expressly exempt from regulation and expressly permitted under this Section.

F. SIGNS PERMITTED IN PUBLIC RIGHTS-OF-WAY.

No sign shall be permitted in any public right-of-way except for the following:

1. Public signs;

2. Signs erected by the North Carolina Department of Transportation;

3. Bus stop signs. erected by a public transit company;

4. Emergency warning signs erected by a governmental agency, a public utility company, or a contractor doing work within the public right-of-way;

5. Signs erected pursuant to a permit for temporary use issued by the Director of Inspection Services, subject to such separate ordinance or regulations as may be applicable;

6. Posters allowed under Section 12-6 of the Durham City Code;

7. Awning, projecting, and suspended signs projecting over a public right-of-way in conformity with the conditions of Table 4, of this section;

8. Signs identifying a recognized community, subdivision or development provided that such signs are covered by an Encroachment Agreement in accordance with Subsection 24-14.Q. *Encroachment Agreements* and that such signs either: were I awfully erected and in existence on or before June 1, 1988; or are consistent with an approved

site plan, or subdivision plat, if applicable, for the development.

G. INTERPRETATION, DEFINITIONS AND COMPUTATIONS.

This Section 14 shall be construed in accordance with the following:

1. INTERPRETATION. Words used in this Section shall be given their common, ordinary meanings unless otherwise defined herein or unless the context otherwise clearly requires. The singular shall be construed to include the plural. Words of one gender shall be construed to include such other genders as the context or the application of this Section may require. Captions are finding aids only and shall not be used in construing the ordinance. If the requirements of any part of this section conflict with any other part of this section or any part of any other ordinance of the City including but not limited to Section 24-4.D.5 *Regulation of Development Within Major Transportation Corridors* and Section 24-4.D.6. *Historic District Overlay Zone*, then the more restrictive requirements shall control. The definitions and classification of types of signs under this ordinance shall have no effect on the separate classification of signs under Chapter XXIII of the North Carolina Building Code, which classification is for a different purpose.

2. DEFINITIONS. The following words shall have the specific meanings set forth below:

   a. AREA. Area shall mean the surface area of a sign as computed in accordance with paragraph 3 below.

   b. AWNING SIGN. A sign which is a part of a fabric or other non-structural awning.

   c. BANNER. A lightweight fabric or similar material which is permanently mounted to a pole, either enclosed in a frame or mounted to allow movement caused by the atmosphere. A banner shall be considered a sign if it contains any message or logo.

A banner may be a suspended sign, a freestanding sign or a projecting sign, depending on its installation.

d. CANOPY ROOF. A permanent, decorative porch or walkway cover other than an awning.

e. CONSTRUCTION SIGN. A sign which identifies architects, engineers, contractors and other individuals or firms involved with construction on the premises, the name of the building or development, the intended purpose of the building, and/or the expected completion date.

f. DOOR SIGN. A sign which is attached to, painted on or etched onto or into a door. A sign in a window which is part of a door is a "door sign" for purposes of this section.

g. FREESTANDING SIGN. A sign which is attached to the ground by one or more supports which are not part of a building.

h. HEIGHT. Height shall mean the height of a sign as computed in accordance with paragraph 3 below.

i. HISTORICAL OR MEMORIAL MARKER. A sign or tablet, indicating the name and/or date of construction of the building of which it is a part, when cut into any masonry surface or when constructed of bronze, or other incombustible materials. Also, a sign placed to identify a bona fide historical structure or site, and which is directly related to the premises on which it is placed.

j. INCIDENTAL SIGN. An on-premise sign giving information for the convenience and necessity of the public such as "entrance," "exit," "no admittance," "telephone," "parking," etc.

k. MARQUEE SIGN. A sign affixed to and forming a part of the structure of a hood, canopy or projecting roof structure over the entrance to a building, store, or place of public assembly.

l. NONCOMMERCIAL SIGN. A sign which is not an on premises or off-premises sign and which carries no message, statement, or expression related to the commercial interests of the sign owner, lessee, author or other person responsible for the sign message. Noncommercial signs include but are not limited to: signs expressing political or religious views; signs of nonprofit organizations, related to their tax-exempt purposes.

m. OFF-PREMISES SIGN. A sign which directs attention to a business, commodity, service or entertainment not conducted, sold or offered on the premises where the sign is located, or which business, commodity, service or entertainment forms only minor and incidental activity upon the premises where the sign is displayed.

n. ON-PREMISES SIGN. A sign which advertises or directs attention to a business, commodity, or service conducted, offered, or sold on the premises, or directs attention to the business or activity conducted on the premises.

o. OBSOLETE SIGN. A sign related to or identifying a business or activity no longer conducted on the premises, or an off-premises or noncommercial sign related to: a product or service no longer available; a business no longer in existence; an election or event which has occurred in the past; a party or nonprofit organization which is no longer in existence.

p. PORTABLE SIGN. Any sign not permanently attached to the ground or other permanent structure, including but not limited to signs: with attached wheels; converted to A- or T-frame signs; menu and sandwich board signs; gas or hot-air filled balloons; signs attached to or painted on vehicles parked and visible from the right-of-way, unless said vehicle is used in the normal day to day operations of the business.

q. PROJECTING SIGN. A sign attached to the exterior wall of a building and forming an angle with said wall.

r. PUBLIC SIGN. A sign erected by or on behalf of a governmental body to post a legal notice, identify public property, convey public information, and direct or regulate pedestrian or vehicular traffic.

s. REAL ESTATE SIGN. A sign advertising the premises for sale, rent or lease.

t. ROOF SIGN. A sign which is placed above the roof of any building to which it is attached. A sign attached to the lower slope of a roof or a canopy roof or attached to a parapet wall above a flat roof is not a roof sign for purposes of this Ordinance but is a wall sign.

u. SUSPENDED SIGN. A sign which is suspended from the underside of a horizontal plane surface and is supported by such surface.

v. TEMPORARY SIGN. Any sign, including a pennant, other than a banner, made from any material which is intended for temporary use, or which is not permanently mounted.

w. WALL SIGN. Any sign, other than a projecting sign, which is attached to or painted on any wall of any building and projects from the plane of the wall less than twelve inches. A sign attached to the lower slope of a mansard or canopy roof, or a sign affixed to or forming an awning or a canopy, shall be considered a wall sign for purposes of this ordinance, notwithstanding the fact that certain portions of such a sign may project more than twelve inches. For purposes of sign regulation only, a "wall" shall include any permanent architectural extension of a wall which is of the same material as the wall of which it is an extension, even if such extension projects beyond or above the enclosed portions of the building.

x. WINDOW SIGN. Any sign which is attached to, painted on or etched into a window or which is displayed within twelve (12) inches of the window and is legible from outside the window.

3. COMPUTATIONS. The following principles shall control the determination of sign area and sign height:

a. AREA OF INDIVIDUAL SIGNS. The area of a sign shall be computed by means of the smallest square, circle, rectangle, triangle or combination thereof which will encompass the extreme limits of the writing, representation, emblem, or other display, together with any material or color forming an integral part of the background of the display or, used to differentiate the sign from the backdrop or structure against which it is placed, but not including any supporting framework, bracing, or decorative fence or wall when such fence or wall otherwise meets Zoning Ordinance regulations that is clearly incidental to the display itself.

b. MULTI-FACED SIGNS — COMPUTATION OF AREA. For multifaced signs, the sign area shall be computed by including all sign faces visible from any one point. When two identical sign faces are placed back to back so that both faces cannot be viewed from any point at the same time, and when such sign faces are part of the same sign structure and are not more than forty-two (42) inches apart, the sign area shall be computed by the measurement of one of the faces.

c. HEIGHT. Sign height shall be computed as the distance from the base of the sign at the normal grade to the top of the highest attached component of the sign. Normal grade shall be construed to be the existing grade prior to construction or the newly established grade after construction exclusive of any filling, beaming, mounding, or excavating solely for the purpose of locating the sign.

d. MAXIMUM SIGN AREA — COMPUTATION OF TOTAL PERMITTED SIGN AREA FOR A LOT. The permitted sum of the area of all individual signs on a lot shall be computed by applying the formula contained in Table 3. *Permitted Total Sign Area* to the lot frontage, building frontage or wall area, as appropriate, for the zoning district in which the lot is located. Lots fronting on two or more streets are allowed the permitted sign area for each street frontage. However the total sign area that is oriented toward a particular street may not exceed the portion of the lot's total sign area allocation that is derived from that street.

H. SIGNS PERMITTED ON PRIVATE PROPERTY.

Signs other than those included in Subsection 24-14.C *Exemptions* and 24-14.D *Signs Not Requiring Sign Permits* are permitted on private property only after issuance of a sign permit following the procedures of Subsections K. *Overall Sign Plan Required* and L. *Permits Required Procedure* and only when in compliance with the following:

1. The purpose for which the sign is used complies with the specifications of Table 1. *Permitted Sign Usage*.

2. The type of structure used for the sign complies with the requirements of Table 2. *Permitted Sign Types*.

3. The sum of the area of all freestanding, marquee, projecting, roof, suspended, temporary and wall signs on the lot complies with the maximum permitted sign area as determined by the formula for the zoning district in which the lot is located as specified in Table 3. *Permitted Total Sign Area*.

4. The size, location and number of signs on the lot complies with the requirements of Table 4. *Permitted Sign Dimensions by Sign Type* and with Section 24-14.I. Schedule of Conditions Referenced in Tables 4 and 5.

5. The characteristics of the sign complies with the limitations of Table 5. *Permitted Sign Characteristics*

and with Section 24-14.I. *Schedule of Conditions Referenced in Tables 4 and 5*.

Noncommercial signs shall be permitted in each district, subject to the same restrictions, permit requirements, conditions and other standards as would apply to an on-premise sign similarly situated, including real estate signs.

[TABLES 1-5 OMITTED]

I. SCHEDULE OF CONDITIONS REFERENCED IN TABLES 4 AND 5.

1. BANNERS.

Banners containing any message or logo shall be considered signs and shall be classified as suspended signs, projecting signs or freestanding signs, depending on the method of installation, and shall be subject to the conditions applicable to such signs.

However, decorative banners which meet the following conditions shall not be considered signs and shall not be included in the computation of total sign area on the property and shall not require the issuance of a sign permit:

a. Each such banner must be at least 6 square feet in area and less than 36 square feet in area and all banners on the same lot must be consistent in colors and materials.

b. No such banner may contain a commercial advertising message, including the name or logo of any use on the lot.

c. Each banner must be individually attached to a pole, mastarm or other device.

d. Where multiple decorative banners are to be placed on a lot, a common signage plan must be approved for the property under the procedures set out in Section 24-14.K.2 *Common Signage Plan*. Such plan shall include the size, location, color, materials and design of the decorative banners.

e. All banners must be maintained in good condition without fraying, tearing or fading.

2. FREESTANDING SIGN REGULATIONS.

The following regulations shall apply to all freestanding signs in any district where they are permitted.

a. GENERAL

(1) PLACEMENT IN LANDSCAPED AREAS. A freestanding sign may be placed in any area which is required to be landscaped except required buffer areas adjacent to residential uses or zoning districts.

(2) ADJACENT TO RESIDENTIAL PROPERTY. In R districts (R-2 to R-2O, inclusive) or on a I to abutting or across the street from such an R district, no freestanding sign shall be located closer than 25 feet to the property line of any residentially-zoned lot and may be internally illuminated only if the background of the sign is opaque or if the light broadcast from the sign does not exceed 1/2 footcandle at the property line of any such residentially-zoned lot.

b. IN NONRESIDENTIAL DISTRICTS

(1) On lots containing more than a single business or use, freestanding signs shall display only one sign face with uniform graphics and lettering; provided, however, that the Subdivision Review Board may approve, as an alternative, freestanding signs which display a directory of businesses or uses located on the lot as long as such signs meet the criteria for uniformity specified in Subsection 24-14.K.2. *Common Signage Plan.*

(2) On lots with street frontage greater than 150', the Subdivision Review Board may approve additional freestanding signs in excess of the general limitation of 1 per frontage as shown in

Table 4 provided that the total number of permitted freestanding signs is computed at a rate of 1 per each 150' of frontage and provided that all such signs meet the criteria for uniformity specified in Subsection 24-14.K.2. *Common Signage Plan* and provided that the sum of the area of all such signs does not exceed 80 square feet plus .25 SF per 1 1f of street frontage in excess of 150 feet, provided that no individual sign exceeds 80 SF in area.

(3) In C-1A districts a freestanding sign may be placed on a shopping center outparcel only when such outparcel has a minimum width of 100 feet and when such sign does not exceed 32 square feet in area and 4 feet in height.

(4) A freestanding sign may exceed the 16' height shown in Table 4 provided the following conditions are met:

(a) the sign serves a highway oriented business such as a gasoline station, restaurant or motel;

(b) the sign is located within 150 feet of the right-of-way of a control led or limited access highway or is located within 400 feet of the right-of-way of such highway and within 150 feet of the right-of-way of a street which intersects with and has direct access to such highway;

(c) the height of the sign does not exceed 60 feet;

(d) the Board of Adjustment grants a use permit for the sign according to the provisions of Section 24-20.B. *Use Permits*; and

(e) in addition to the specific findings contained in Subsection 24-2O.B.5.

Considerations, the Board of Adjustment finds that the proposed height of the sign is necessary for the base of the face of the sign to be reasonably visible at a height of 5 feet above a natural or artificial obstruction viewed at a distance of 900 feet prior to reaching the exit(s) from the control led or limited access which is (are) nearest the access for property served by the sign and provided the sign meets all the requirements of this ordinance.

The Director of Inspections Services shall specify the information to be provided or procedures to be followed by an applicant in order to provide the documentation necessary to establish the maximum height of the sign in accordance with Subsection 5, above.

If the Board of Adjustment approves a use permit for a sign between 40 and 60 feet in height, then a second freestanding sign shall be permitted for the property regardless of whether or not the property would qualify for a second sign under the provisions of Subsection 24-14.I.2(b) (2). If the property does not qualify for a second sign under the provisions of 24-14.I.2(b) (2), then the second freestanding sign is limited to 32 SF in area and 16 feet in height.

c. IN R AND RG RESIDENTIAL DISTRICTS

(1) One freestanding sign which displays the name of a subdivision may be placed at the entrance(s) to the subdivision provided such sign does not exceed 12 square feet in area and 6 feet in height.

(2) For permitted nonresidential uses, one freestanding sign is allowed per street frontage provided such sign does not exceed 6 feet in height and 12 square feet in area on lots with

frontage of less than 150 feet or 12 feet in height and 25 square feet in area on lots with frontage of 150 feet or more. On lots with street frontage greater than 150', the Subdivision Review Board may approve additional freestanding signs in excess of the general limitation of 1 per frontage as shown in Table 4 provided that the total number of permitted freestanding signs is computed at a rate of 1 per each 150' of frontage and provided that all such signs meet the criteria for uniformity specified in Subsection 24-14.K.2. *Common Signage Plan.*

d. IN RA, PDR AND RMHP RESIDENTIAL DISTRICTS

(1) One freestanding sign which displays the name of a residential development may be placed at the entrance(s) to the development provided such sign does not exceed 32 square feet in area and 12 feet in height.

(2) For permitted nonresidential uses, one freestanding sign is allowed per street frontage provided such sign does not exceed 6 feet in height and 12 square feet in area on lots with frontage of less than 150 feet or 12 feet in height and 25 square feet in area on lots with frontage of 150 feet or more. On lots with street frontage greater than 150', the Subdivision Review Board may approve additional freestanding signs in excess of the general limitation of 1 per frontage as shown in Table 4 provided that the total number of permitted freestanding signs is computed at a rate of 1 per each 150' of frontage and provided that all such signs meet the criteria for uniformity specified in Subsection 24-14.K.2. *Common Signage Plan.*

3. MARQUEE SIGNS.

The following regulations shall apply to all marquee signs in all districts in which they are permitted.

a. Marquee signs may extend over a required front yard or sidewalk, provided that a vertical clearance of nine (9) feet or more is maintained beneath the sign.

b. No marquee sign shall be closer than two (2) feet, measured in horizontal distance from the curb line of any street.

c. Marquee signs may extend for the full length and width of the marquee.

d. The height of marquee signs shall not exceed five (5) feet, except that marquee signs for motion picture theaters, public auditoriums, and assembly hall is may have a height not exceeding eight (8) feet.

4. PROJECTING SIGNS.

The following regulations shall apply to all projecting signs in all districts in which they are permitted.

a. A projecting sign may not extend above the top of the wall to which it is attached, except that signs 18 inches or less in width and perpendicular to such wall may extend not more than two feet above the top of such wall.

b. A projecting sign may not extend into a required front yard by more than 6 feet or into a public right-of-way by more than 4 1/2 feet.

5. ROOF SIGNS.

A roof sign is permitted only on buildings of 10 stories or more in C-3 districts or in the Downtown Transition Area Overlay Zone.

6. SUSPENDED SIGNS.

Suspended signs shall not be nearer than 2 feet measured in horizontal distance to the curb Ii ne of any street.

7. TEMPORARY SIGNS.

Temporary signs are permitted if and only if:

a. Their use is limited to a term of not more than 30 days, which is nonrenewable during the following calendar year;

b. A permit for their use is obtained from the Department of Inspections, and;

c. The sign does not violate any sign ordinance regulation other than exceeding the total sign area permitted for the lot.

8. WALL SIGNS.

The following regulations shall apply to all wall signs in all districts in which they are permitted.

a. A wall sign shall not extend beyond the building line more than 12 inches, except in the case of a sign on the lower slope of a roof or a canopy roof, in which case the top of the sign may extend from outwards from the surface of the roof the distance required to made the sign face vertical.

b. A wall sign shall not extend into any public right-of-way, except that a sign with a vertical clearance of not less than 9 feet above the ground level may extend 12 inches into a public right-of-way and any sign not more than 6 square feet in area may extend 2 inches into a public right-of-way at any height.

c. A wall sign shall not extend beyond the ends of the wall to which it is attached, except that where such wall sign is continuous on 2 adjacent walls of the same building, the connecting portion of a sign may extend to but not beyond, the face of the adjoining portion.

d. No wall sign shall be so erected as to cover the doors or windows of any building or otherwise prevent free ingress or egress to or from any window, door, or fire escape.

e. The total wall sign area shall be the sum of all signs on the wall, including signs on wall surfaces, signs affixed to the wall parallel and in the same plane as the wall, signs on awnings or canopies, Window signs, door sign s, signs on the lower slopes of roofs or canopy roofs and signs on paparet wall is above flat roofs.

f. IN R and RG RESIDENTIAL DISTRICTS

(1) For permitted nonresidential uses, one wall sign is permitted per building provided such sign does not exceed 25 square feet in area or 20% of the wall area, whichever is less.

g. IN RA, PDR AND RMHP RESIDENTIAL DISTRICTS

(1) For permitted multifamily developments, one wall sign is permitted per building provided such sign does not exceed 25 square feet in area or 20% of the wall a area, whichever is less.

(2) For permitted nonresidential uses, one wall sign is permitted per building provided such sign does not exceed 25 square feet in area or 20% of the wall area, whichever is less.

9. AWNING SIGNS.

The following regulations shall apply to all awning signs in all districts in which they are permitted.

a. All awning signs shall be flat against the surface of such awning.

b. All awning signs within a public right-of-way or required front yard shall maintain a vertical clearance of nine (9) feet or more from the rigid mount of the awning above the ground or sidewalk

level and shall not be closer than two (2) feet measured in horizontal distance from the curb line of any street, nor shall they extend more than five feet into a public right-of-way. A fabric valence of the awning may extend one foot below the rigid mount of the awning.

c. The area of all permitted awning and canopy signs shall be included in the area of wall signs.

10. CHANGEABLE COPY ON SIGNS.

The following regulations shall apply to all changeable copy signs in districts where they are permitted.

a. Either computer-driven or manually changeable copy is permitted.

b. A changeable copy sign on which copy other than time and temperature is in fact changed more than eight (8) time in any one day shall be considered a prohibited animated or flashing sign. The number 8 in the preceding sentence is expressly intended to apply to the number of changes, regardless of the number of messages.

c. No more than fifty percent (50%) of the area of a single sign shall be usable for changeable copy.

d. Changeable copy shall be used in residential areas for signs for permitted institutional uses only.

11. ILLUMINATED SIGNS.

a. Signs may be illuminated from within or from an external source, but such illumination must be n a manner which avoids glare or reflection which in any way or manner interferes with traffic safety.

b. In R, RA, RG, RMHP, PDR, 0-I and O-I-L districts, internally illuminated signs shall be permitted only if the background of the sign is opaque and copy is either translucent and transilluminated or opaque and back it.

c. Internally illuminated signs must comply with Subsection 24-14.1.2(a) (2) *Adjacent to Residential Property*, where applicable.

J. DESIGN, CONSTRUCTION & MAINTENANCE.

All signs shall be designed, constructed and maintained in accordance with the following standards:

1. COMPLIANCE WITH CODES. All signs must comply with the applicable provisions of the North Carolina State Building Code and the National Electrical Code.

2. PERMANENCY REQUIRED. Except for the following, all signs shall be constructed of permanent materials and shall be permanently affixed to the ground or building. Exceptions: Temporary signs permitted under Subsection 24-14.1.7; signs advertising premises for sale, lease or rent; signs providing information on construction taking place on the premises; window signs; signs which are in fact temporary, such as yard sale or political campaign signs.

3. MAINTENANCE. All signs shall be maintained in good surface and structural condition and in compliance with all building and electrical codes and with the requirements of this Section 14 at all times.

K. OVERALL SIGNAGE PLAN REQUIRED

1. GENERAL PROCEDURES. Prior to issuance of a sign permit for any sign on a lot, an overall signage plan shall be filed with the Director of Inspections Services. Such signage plan shall indicate the general location, maximum dimensions and structural type of all signs to be located on the lot. An authorization form for submittal of the overall signage plan shall be signed by all owners of the lot or their authorized agents. In cease of any conflict between the overall signage plan and any ordinance of the City, the ordinance shall apply.

2. COMMON SIGNAGE PLAN. When more than one use or business is located on a lot, the overall signage plan for the lot shall be a Common Signage Plan which shall

provide for consistency among signs on the premises with regard to at least four of the following: material; location of each sign on the building; sign proportions; color scheme; lettering or graphic style; lighting. The common Signage Plan shall be approved by the Subdivision Review Board prior to issuance of any sign permits.

For an existing development, a common signage plan must be submitted and approved by. September 1, 1998 or at such time that a permit is requested for a new sign to be added to the property, whichever occurs first. When a common signage plan is submitted prior to September 1, 1998, such plan shall indicate existing nonconforming signs which meet the requirements of Subsection 24-14.0. *Signs Existing on September 1, 1998 or on Annexation* as well as the amount and location of signage to be allocated to each tenant under the new plan. Existing nonconforming signs which meet the requirements of Subsection 24-14.0. *Signs Existing on September 1, 1998 or on Annexation* and which do not comply with the common signage plan may remain until September 1, 1998 or until the sign in changed in accordance to the provisions of Subsection 24-14.0.2. *Certain Nonconforming Existing Signs*. If the total existing signage exceeds the total permitted signage under the new regulations, a new or replacement tenant would be allowed its share of signage based on the approved common signage plan.

As part of its approval of a Common Signage Plan, the Subdivision Review Board may approve the following alternatives to the specific requirements contained in Subsection 24-14.I.2 *Freestanding Signs:*

a. DIRECTORY SIGNS. The Subdivision Review Board may approve one or more freestanding signs which display a directory of businesses or uses located on the lot provided such signs are consistent in material, sign proportions, lettering or graphic style, and color scheme.

b. NUMBER OF FREESTANDING SIGNS. The Subdivision Review Board may approve additional freestanding signs in excess of the general limitation of one per frontage as shown in Table 4 provided that the total number of permitted freestanding signs is computed at a rate of one per each 150' of frontage; provided that the sum of the area of all such signs does not exceed 50 square feet plus .25 SF per 1 lf of street frontage in excess of 150 feet; and provided that such signs are consistent in material, lettering or graphic style and color scheme.

3. AMENDMENT. Any overall signage plan, including a Common Signage Plan, may be amended by filing a new Plan which complies with all of the requirements of this Subsection and which includes a schedule for bringing any existing signs not in conformance with the proposed amended Plan into compliance with it within a specified time. Signs which were in existence as of September 1, 1988 shall be brought into compliance with the overall or Common Signage Plan by September 1, 1998 or at such time as the sign is altered pursuant to Section 24-14.0.2. *Certain Nonconforming Existing Signs*. Signs erected after September 1, 1988 and subsequently made nonconforming because of an amendment to an overall or Common Signage Plan shall be brought into compliance with the amended plan within six months of approval of said plan.

L. PERMITS REQUIRED. PROCEDURE.

Signs identified as "S" on Tables 1, 2, or 5 shall be allowed only in accordance with a duly-issued, current, and valid Sign Permit from the Director of Inspections Services. Permits shall be issued only in accordance with the following requirements and procedures:

1. PERMIT FOR NEW SIGN OR FOR SIGN MODIFICATION.

Every application for a Sign Permit shall be submitted on forms provided by the Director of Inspections Services

and shall be accompanied by all applicable fees and by detailed drawings to show the dimensions, design, structure and location of each particular sign. One application and permit may include multiple signs on the same lot. No incomplete application shall be processed. No sign permit shall be issued unless the sign is in compliance with the overall signage plan.

A sign permit including window signs may simply indicate the areas of the windows to be covered by window signs and the general type of the window signs (painted or etched on glass, or some other material hung inside window) and need not specify the exact dimension or nature of every window sign.

The Director of Inspections Services shall cause an inspection of the premises for which each permit for a new sign or for modification of an existing sign is issued during the sixth month after the issuance of such permit or at such earlier date as the owner may request. If the construction is not substantially complete at the time of inspection, the permit shall lapse and become void. If the construction is complete and in full compliance with this ordinance and with the North Carolina State Building Code and the National Electrical Code, the Director of Inspections Services shall affix to the premises a permanent symbol identifying the sign(s) and the applicable permit by number or other reference. If the construction is substantially complete but not in full compliance with this ordinance and all applicable codes, the Director of Inspections Services shall give the owner or applicant notice of the deficiencies and shall allow an additional thirty (30) days from the date of inspection for the deficiencies to be corrected. If the deficiencies are not corrected by such date, the permit shall lapse. If the construction is then complete, the Director of Inspections shall affix to the premises the permanent symbol described above.

2. ASSIGNMENT OF SIGN PERMITS. A current and valid sign permit shall be freely assignable to a successor

as holder of a business license for the same premises subject only to such application and filing requirements as the City may from time to time reasonably require.

M. TEMPORARY SIGNS. PERMITS REQUIRED PROCEDURE.

Temporary signs other than those specified in Section 24-14.C and D. shall be allowed only upon the issuance of a Temporary Sign Permit, which shall be subject to the following procedures and conditions:

1. Every application for a temporary sign permit shall be submitted on forms provided by the Director of Inspections Services and shall be accompanied by all applicable fees and by detailed drawings to show the dimensions, and location of the sign;

2. A Temporary Sign Permit shall allow the use of a temporary sign for a specified 30-day period;

3. Only one temporary sign permit shall be issued to the same business or business license holder on the same lot in one calendar year.

N. NONCONFORMING & OBSOLETE SIGNS & SIGNS WITHOUT PERMITS.

Except as otherwise provided herein, the owner of any lot or other premises on which exists a sign which does not conform with the requirements of this Section and which is obsolete (as defined hereunder) shall remove such sign or bring it into conformity with the requirements of this Section 14 when the use or business with which the sign is associated is discontinued or abandoned for 6 consecutive months.

0. SIGNS EXISTING ON SEPTEMBER 1, 1988 OR ON ANNEXATION.

1. GENERAL. For existing signs in the City of Durham or within its extraterritorial area on September 1, 1988, applications for Sign Permits must be submitted to the City between September 1, 1989 and January 1, 1990. For signs on property outside the City's extraterritorial

area on September 1, 1988 and subsequently annexed to the City of Durham, applications for Sign Permits shall be submitted within six months of the effective date of the annexation. Applications received after the applicable date set forth in this section shall be subject to all of the terms and conditions of this ordinance.

Each such application shall be accompanied by a photograph of each sign involved and with data on the dimension and location of each such sign; the application shall be accompanied by any available engineering drawings but shall not require new engineering drawings if none are available from the owner or contractor.

Applications for permits for existing signs submitted before January 1, 1990, shall be exempt from the initial fees set forth in this Section, but not from subsequent fees.

2. CERTAIN N0NCONF0RMING EXISTING SIGNS. A sign which would be permitted under this Section only with a Sign Permit (other than a Temporary Sign Permit) but which was in existence on September 1, 1988, or on a later date when the property is annexed to the City and which was constructed in accordance with the ordinances and other applicable laws in effect on the date of its construction, but which by reason of its size, height, location or other characteristics is not in conformance with the requirements of this ordinance, shall be permitted to be maintained in use in accordance with the terms of a Nonconforming Sign Permit if such permit is obtained in a timely manner by the owner or lessee thereof.

Such permit shall allow the sign(s) subject to such permit which were made nonconforming by the adoption of this Section to remain in place and be maintained for a period ending no later than September 1, 1998 or for a period of 10 years after the effective date of annexation, provided that no action is taken which increases the degree or extent of the nonconformity. A change in the information on the face of an existing nonconforming sign is

permitted, provided such change complies with relevant sections of this Section 14. However, any nonconforming sign shall either be eliminated or made to conform with the requirements of this Section when any proposed change, repair or maintenance would constitute an expense of more than twenty-five percent (25%) of the lesser of the original value or replacement value of the sign.

3. OTHER NONCONFORMING EXISTING SIGNS. Temporary signs, portable signs, pennants, strings of lights and other signs which are prohibited by this ordinance by reason of their construction type or other characteristics shall be removed and eliminated on or before January 1, 1989. Sign lighting and motion which are prohibited by this ordinance shall be eliminated or altered to conform with this Section on or before January 1, 1989.

4. SIZE BONUS: Any owner who files an application by September 1, 1991 for a sign permit to bring all of the existing signage on a lot into conformance with the regulations of this Section 24-14 shall be allowed a bonus of twenty (20%) in the total sign area and in area permitted for freestanding signs for that property. Once a sign has been erected pursuant to this bonus allowance, such sign may remain until any proposed change, repair or maintenance would constitute an expense of more than 25% of the lesser of the original value or replacement value of the sign. At such time as the sign is replaced, it must comply with all the regulations of Section 24-14. Existing signs which are not proposed to be changed in order to be brought into compliance with the ordinance would not qualify for any size bonus.

P. FEES.

Every application for a sign permit shall be accompanied by a fee in the amount established by resolution of the City Council.

Q. ENCROACHMENT AGREEMENTS.

Signs allowed to encroach on public rights-of-way under the terms of this Section or all owed to continue to encroach on public rights-of-way after the adoption of this Section shall be allowed to so encroach only so long as there is in effect between the owner of the sign and the City of Durham an Encroachment Agreement in a form to be determined from time to time by the City Attorney. Such Agreement shall at a minimum provide that: the sign owner shall not be compensated by the City for any loss of or damage to the sign from any cause; the sign owner shall remove the sign at the sign owner's expense if the City determines at any time that the sign interferes with the public use of the right-of-way; the sign owner shall maintain the sign; if the sign projects or is suspended over the public right-of-way, the sign owner shall agree to provide insurance or satisfactory indemnification of the City against liability for injury to persons or property from the sign.

R. ADMINISTRATION AND ENFORCEMENT.

1. UNLAWFUL ACTS. It shall be a violation of this Section 14 to do any of the following after September 1, 1988:

   a. To erect, install , create or maintain any sign in violations of any part of this ordinance;

   b. To erect, install, create or maintain a sign which requires a permit without obtaining and maintaining in effect such a permit;

   c. To erect, install, create or maintain a sign which is in any way inconsistent with a permit issued for such sign;

   d. To file a permit application which contains any false representations, written or photographic;

   e. To maintain or to own property and all ow on such property the maintenance of any sign which was I awfully erected, installed or created, if such sign

requires a permit under this Section 14 if no permit has been issued.

2. REMEDIES. In case of any violation of this Section 14, the City may pursue one or more of the following remedies:

   a. Any remedy provided under the general zoning ordinance;

   b. Revocation of any Sign Permit(s) involved in the violation;

   c. Revocation of any other Sign Permits on the same lot as the violation or issued in the name of any person found to have violated this ordinance during the period of such permit;

   d. Removal of the sign(s) which is or are the subject of the violation of this Section 14.

The procedures for pursuing such remedies shall be the same as the enforcement procedures under the general zoning ordinance.

Supreme Court, U.S.
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No. 94-109

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NAEGELE OUTDOOR ADVERTISING, INC.,
Petitioner,

v.

CITY OF DURHAM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1984 the City of Durham passed amendments to its sign ordinance to improve safety and aesthetics. The amendments banned all new commercial billboards (off-premise signs) and required the removal of existing commercial billboards, except those along federally-assisted highways, after a grace, or "amortization" period of 5½ years, later changed to 6 years. Noncommercial billboards were not required to be removed, although they were required to conform to certain dimensional restrictions. Naegele owns billboard structures affected by this removal requirement, and has contracts with landowners to use their parcels for a single use—billboard display. The questions presented are:

1. Whether the regulation of commercial off-premise billboards violates the First Amendment because noncommercial billboards are not identically restricted.

2. Whether the amortization period avoids a taking when the billboard owner has no vested rights under North Carolina law to continue its existing use, and when a court has found the amortization period to be reasonable in light of numerous factors, including the limited nature of the contractual property interests, and the recoupment of the cost and the value of the billboard structures during the amortization period.*

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* Pursuant to Rule 29.1, the City of Durham states that it is a municipal corporation under the laws of North Carolina with no parent company or subsidiary.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In 1984 the City of Durham passed amendments to its sign regulations to address the safety and aesthetic problem caused by distracting off-premise signs (hereinafter "billboards").* C.A. App. 57, 209. Because prior regulations restricting the location of billboards had been ineffective, the City banned all new commercial billboards, and required that existing billboards be removed by their owners after a 5½-year grace period, or "amortization" period. C.A. App. 64, 66, 205. This was later changed to six years. C.A. App. 216. Billboards having state permits that were located adjacent to interstate and federally-

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* In this brief "billboards" refers to off-premise signs, and does not encompass other signs, such as on-premise business signs.

assisted highways were exempt from removal, as were noncommercial billboards, of which there were few. C.A. App. 64, 66, 205. The ordinance regulated noncommercial signs by size and structure. Pet. App. 37a.

Approximately 65 of Petitioner Naegele's 109 billboard structures in the City are affected by the removal provision. These structures were constructed at an average cost of $2,000 per structure between 1965 and 1980.[1] They are located on parcels of land that Naegele does not own, but rather contracts with landowners to use for the single purpose of displaying billboards.[2] The leases impacted by amortization average 8.6 years, including options to extend. Pet. App. 11a. Naegele owns the signs as personal property and removes them when leases are terminated. *Id.* The contracts can be terminated by the landowners if they choose to sell or develop their land and by Naegele if government restricts their right to maintain billboards. C.A. App. 500. During the lease terms, the landowners retain the right to use their property for all purposes except billboard advertising. *Id.* The zoning on these parcels permits a wide variety of over forty uses, including substantial office, commercial, or industrial construction. C.A. App. 79, 506-522.

North Carolina law establishes that owners of existing uses have no indefinite "vested rights" with regard to such uses, and that such uses can be terminated through the use of amortization. *State v. Joyner*, 211 S.E.2d 320 (N.C. 1975), *appeal dismissed*, 422 U.S. 1002 (1975). In addition, the state legislature passed legislation in 1969 allowing the City of Durham to terminate uses through amortization. 1969 N.C. Sess. Laws, Ch. 654 § 1.

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[1] Naegele's assertion that the cost of a billboard is $40,000 is not supported by the factual stipulations. C.A. App. 79-85, 91-92, 143-149.

[2] Naegele's "leases" are easements since they do not give exclusive possession of a defined portion of land. John Bruce & James Ely, Jr., *The Law of Easements and Licenses in Land*, § 1.05 (1988).

The Durham sign amendments were challenged by the then-owner of the billboards on the grounds that they violated the First, Fifth, and Fourteenth Amendments of the Constitution. After the complaint was filed, Petitioner purchased the billboards and the company's name ("Naegele") and was substituted as plaintiff in the case.

After discovery, on cross-motions for summary judgment the district court held for the City on all claims. The court of appeals affirmed this decision in 1988 on the First Amendment issue under the authority of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503-516 (1981). Pet. App. 23a. It held that under that decision a City may ban billboards as long as it does not impermissibly prefer commercial over noncommercial speech, which the Durham ordinance did not. It also found that the Durham ordinance was substantially similar to billboard ordinances it had upheld in *Georgia Outdoor Advertising, Inc. v. Waynesville*, 833 F.2d 43 (4th Cir. 1987) and *Major Media of the Southeast v. Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987). *Id.* Further, it found the City's interest in aesthetics to be sufficient to justify the ordinance. Pet. App. 23a-24a.

On the takings issue, however, the court of appeals remanded for further evidence in light of the *ad hoc* factual inquiries needed to evaluate a takings claim. Pet. App. 29a. In consideration of Naegele's claim that not only did the ordinance damage the billboards subject to removal (the "disputed billboards or signs") but also its "integrated business" and billboards not subject to removal, Pet. App. 26a, the court directed the district court on remand to determine what effect the ordinance would have on Naegele's integrated business at the end of the amortization period. Pet. App. 28a-29a. It advised that the unit of property to be used for this assessment should be defined by the extent Naegele markets its signs as a group. *Id.* With regard to the amortization provision, the court reaffirmed its holding in *Raleigh* that amortization

was constitutional, but found that the reasonableness of any particular amortization period could only be determined on the basis of factual evidence concerning the owner's loss. Pet. App. 30a. Accordingly, the court directed the lower court to canvass all the facts with regard to the takings claim, and suggested at least thirteen different areas of factual inquiry. Pet. App. 32a. Some of these, such as the loss of sharing revenue and the percentage and value of the disputed billboards compared to the remaining billboards, pertained to the loss in value of the integrated sign business Naegele claimed was damaged. *Id.* Most of the factual inquiries, however, such as the number of disputed billboards, whether they are economically useless, the lease terms for the land on which they are located, and their cost, life expectancy, depreciation, income during amortization, and salvage value pertained to just the disputed billboards and leases. *Id.*

After remand, given the breadth of the court of appeals' directive, the parties engaged in what may be the most extensive and detailed discovery ever conducted in a billboard amortization case. Thirty-six depositions were taken, including those of seventeen experts and tens of thousands of pages of business records were produced and summarized. The process, described by the district court as "lengthy and exhaustive," Pet. App. 5a, culminated in the parties again filing cross-motions for summary judgment. The City moved for judgment on all issues while Naegele moved for summary judgment solely on the appropriate unit of property. Following these motions, the parties agreed to an extensive set of factual stipulations and attachments totalling over one hundred pages concerning all aspects of the individual billboards' respective cost, income, depreciation, and tax information, the lease history of each individual lease, and certain data with regard to the income and value of the group of Durham metro area signs, of which the disputed billboards were a part. *See* C.A. App. 74-156 for a portion of these stipulations. Some of the stipulations were limited in use to the par-

ties' respective cross-motions for summary judgment, while others were unlimited. Pet. App. 8a, n.2.

The district court used these stipulations as a basis for again granting summary judgment for the City on all issues. The court followed the approach suggested by the court of appeals. With regard to Naegele's claim of loss to its integrated sign business, it determined the appropriate unit was the group of signs Naegele consistently marketed as a group to advertisers 98% of the time. Pet. App. 8a-10a. This unit, the "Durham metro market" consisted of 232 sign faces, 106 of which would be removed after the amortization period. The court reviewed certain stipulations concerning the relative value and income of the signs that would be removed within this unit, and those that would remain, in particular the fact that Naegele would lose only 29.75% of its income capacity after expiration of the amortization period. Pet. App. 15a. With regard to the reasonableness of the amortization period, the court analyzed not the signs in the Durham metro market, but rather the stipulations concerning just the disputed billboards and their associated leases and the income earned during the period from just the disputed billboards. Pet. App. 11a-13a, "Number of Billboards that are Economically Useless" through "Salvage Value of Unusable Billboards". Based on these facts, the court concluded that the amortization period was in fact reasonable, finding in part:

> Naegele received $1,707,559.18 from the disputed signs during the amortization period. Naegele has benefited from income it earned from the disputed signs for two additional years while this litigation has been pending. The revenue Naegele earned from the disputed signs between 1984 and 1989 far outweighs the estimated original construction cost of $130,435.00, the removal cost of $84,677.31, and the replacement cost of $428,136.00. Naegele also has received nearly twice the 1984 FMV of the disputed signs during the amortization period. Because

> the leases contain a termination clause, Naegele will not suffer any loss because of continued liability on its leases.

Pet. App. 17a.

The court also utilized the stipulated facts to apply the three-factor taking analysis articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). It determined that the economic impact of the ordinance was not severe, both because the reduction in the sign revenue from the Durham metro unit would not be substantial after removal of the disputed billboards, and because the amortization income from just the disputed billboards had allowed Naegele to recover twice the 1984 fair market value of those billboards. Pet. App. 17a-18a. It concluded that Naegele's reasonable investment-backed expectations were not frustrated because Naegele had bought the signs with knowledge of the ordinance, and because the amortization period allowed Naegele the use of the disputed signs for 6 years of their average 8.6 year lease period. Pet. App. 19a-20a. It also found that the character of the government action was regulatory and did not result in a physical invasion of Naegele's property. Pet. App. 20a. The Court of Appeals affirmed the district court's opinion in an unpublished opinion that adopted the reasoning of the district court.

SUMMARY OF ARGUMENT

Neither of the issues Naegele presents meets this Court's standards for granting certiorari, and neither raises any Constitutional issues of "great theoretical and practical importance" that are causing confusion amongst the lower federal courts or state courts. The First Amendment issue—whether restrictions on commercial billboards are invalid if they do not identically restrict noncommercial billboards—has not caused any split of opinion amongst the courts applying *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981), in which this court

held that commercial off-site billboards can constitutionally be banned. The courts have had difficulty in applying *Metromedia*, but the inconsistencies in decisions have concerned issues not raised by this case. The sole support Naegele offers for its interpretation that distinctions may not be drawn between commercial and noncommercial speech is *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Naegele interprets that decision too expansively, however, ignoring language limiting the decision to the facts of that case. *Discovery Network* did not hold that government may never distinguish commercial and noncommercial speech, nor did the case establish new constitutional protections for commercial speech. Rather, the court applied the existing test used in evaluating restrictions on commercial speech, the same test applied in *Metromedia* twelve years earlier. The court found that Cincinnati's ordinance did not meet a crucial element of this test—whether there was a "fit" between the government's goal and the means used to reach this goal—because the ordinance would eliminate a mere 62 of 2,000 offending newsracks. In this case, in contrast, the lower courts have determined that this fit exists, and that the ordinance advances its goal of eliminating most billboards on local roadways. Therefore, there is no inconsistency between the result below and *Discovery Network*, and no reason to either grant certiorari or remand this case.

On the taking issue, the determination that the Durham ordinance is not a taking is well within the mainstream of judicial precedent in this area. Stripped of the contested "unit of property" analysis, the district court's decision is a typical fact-intensive, fact-bound amortization analysis that upholds the termination of the commercial use of Naegele's billboards after a generous amortization period. The amortization of utilities, industrial uses, or newspaper companies is not an issue here. The decision is supported by more detailed findings on the nature of Naegele's property interests and the economic value of

the amortization period than is usual in amortization cases. Both the result and the amortization analysis are consistent with over fifty years of precedent from the overwhelming majority of states and from all federal courts that have considered amortization, especially as applied to billboards.

The unit of property determination, although correct and supported by precedent, is irrelevant and unnecessary to the holding that there was no taking. It was used solely to assess the impact the ordinance would have *after the expiration of the amortization period,* an irrelevant inquiry neither consistent with amortization or Supreme Court precedent. The analysis concerning the reasonableness of the amortization period independently supports the outcome below. That analysis was conducted by comparing the length and the economic benefit of the amortization period to various characteristics—cost, value, depreciation status, leasehold terms—of just the disputed signs and leaseholds Naegele suggests are the unit. In other words, the court, without explicit acknowledgment, used Naegele's preferred unit in its analysis of economic impact. However, it applied an *amortization* analysis to that unit which Naegele contests in light of its theory that its time-limited, terminable contracts and single-purpose trade structures cannot constitutionally be amortized. The only support Naegele offers for this theory is a handful of state decisions in which amortization was rejected based on interpretations of state constitutions.

In short, there is no reason for this Court to grant certiorari to review the well-supported taking decision of the district court, unless this Court wishes to entertain Naegele's novel constitutional theories and do away with over half a century of established law upholding local government's right to phase out unsightly billboards after a reasonable amortization period.

Finally, even if Naegele's characterization of the important and unresolved nature of the issues in this case

were accurate, this case is not an appropriate vehicle to resolve these issues. The factual record on the First Amendment issue is limited. In addition, the ultimate taking issue Naegele poses cannot be reached because of limitations on the factual stipulations on which the district court based its decision. And the final decision on the taking issue is merely an unpublished memorandum opinion of the court of appeals affirming a district court opinion, which, in light of its fact-bound context, will have limited precedential value for other courts.

REASONS FOR DENYING THE PETITION

I. THE FIRST AMENDMENT HOLDING BELOW DOES NOT CONFLICT WITH DECISIONS OF THE OTHER FEDERAL APPELLATE COURTS OR WITH THIS COURT'S DECISION IN DISCOVERY NETWORK

Although lower court decisions under *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) have not been uniform, they have not diverged over the central First Amendment issue raised by this case—whether a city must restrict commercial billboards and noncommercial billboards identically. No federal appellate court decision has held that cities must adopt identical regulations for commercial and noncommercial billboards. The heart of the conflict after *Metromedia* is whether ordinances similar to San Diego's are overinclusive and unconstitutionally prohibit too much noncommercial speech. There has been no conflict over sign regulations like Durham's which, acknowledging the protected status of noncommercial speech under the plurality's opinion in *Metromedia*, protect such speech at the risk of being slightly underinclusive.

Although *Metromedia* may have produced a confused welter of opinions, there were areas of agreement that allowed government to proceed with some confidence in certain areas of sign regulation. Thus, as the district court noted in its thorough analysis of the First Amendment

issues in 1987, Pet. App. 40a-50a, and as this Court has just recently noted, seven justices clearly held that a city's interest in avoiding visual clutter is sufficient to justify a prohibition of off-site commercial billboards. *City of Ladue v. Gilleo,* 114 S. Ct. 2038, 2043 (1994). The same justices also held that such billboards could be banned even though on-site commercial signs are allowed. *Metromedia,* 453 U.S. at 511, 552, 562, 570.

The split in opinions in *Metromedia* concerned the degree to which a sign ordinance must protect noncommercial speech. Stressing that Supreme Court cases have consistently accorded noncommercial speech more protection than commercial speech, *id.* at 504-509, the plurality held that the challenged ordinance violated the First Amendment because it allowed on-premise commercial business signs but did not allow similar noncommercial signs. *Id.* at 512-514. Justices Stevens, Rehnquist, and Burger issued separate dissenting opinions. All agreed that, despite its effect on noncommercial signs, the ordinance was constitutional, in large part because it did not discriminate against any particular point of view. *Id.* at 552-53 (Stevens, J., dissenting in part), 562 (Burger, C.J., dissenting), 570 (Rehnquist, J., dissenting). As this district court found below, *Metromedia* "taken as a whole, thus stands for the proposition that a city may distinguish commercial and noncommercial signs, and may ban off-site commercial signs entirely." Pet. App. 43a.

The lower court opinions since *Metromedia* have mirrored the *Metromedia* split over the degree to which sign ordinances must protect noncommercial speech. Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions,* 88 Mich. L. Rev. 2482, 2500-2507 (1990). The majority of courts have followed the plurality's approach and have invalidated ordinances that allow on-site business signs but do not allow noncommercial signs in the same place. *See National Advertising Co. v.*

Town of Niagara, 942 F.2d 145, 147 and 151 (2d Cir. 1991); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 554-557 (2d Cir.), *cert. denied*, 498 U.S. 852 (1990); *Ackerley Communications, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988); *see also Dimitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993). A second group of decisions, also relying on the plurality opinion, has upheld ordinances like Durham's that "fix" the problem identified in *Metromedia* by allowing signs with any noncommercial message either everywhere or as a substitute for on-premise business signs. *See National Advertising Co. v. City and County of Denver*, 912 F.2d 405, 410 (10th Cir. 1990); *Georgia Outdoor v. Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987); *Major Media of the Southeast v. Raleigh, supra*. On the other hand, some courts, primarily in the sixth circuit, following the approach of the three dissenters, have upheld ordinances that substantially limit certain types of noncommercial signs, such as political signs. The ordinances in those cases allowed on-premise business signs and noncommercial signs related to an on-premise activity. The opinions reasoned that despite prohibiting significant noncommercial speech the ordinances were even-handed in their treatment of commercial and noncommercial speech and were viewpoint neutral. *Messer v. Douglasville*, 975 F.2d 1505, 1509-1510, 1513 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993); *Rzadkowolski v. Village of Lake Orion*, 845 F.2d 653, 654-655 (6th Cir. 1988); *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 592-594 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

The direct inconsistencies between these decisions are thus between those cases invalidating ordinances like San Diego's in reliance on the plurality opinion that they don't protect noncommercial speech enough and those upholding very similar ordinances as "viewpoint neutral"

for the reasons given by the three dissenters. *Note, supra,* 88 Mich. L. Rev. at 2500-2507. Because the courts' main concern under *Metromedia* has been *protection* of commercial speech, no decision has held that noncommercial speech must be regulated as strictly as commercial speech, or has invalidated an ordinance like Durham's that attempts to fix the problems identified in *Metromedia* by allowing noncommercial signs to continue to exist. *Id.* at 2511-2514. Although the approach of allowing noncommercial billboards while disallowing commercial billboards may present certain problems, it may be "best of all solutions for a compromise," especially if, as in Durham's ordinance, noncommercial signs must conform to certain regulations. *Id.* at 2515.

The two cases which Naegele contends conflict with the holdings below are not in conflict. The first, *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), concerned a sign ordinance that discriminated against political signs, unlike the Durham ordinance in this case. In striking down the ordinance the court issued three separate opinions. *Id.* at 1047, 1079, 1080. Much of the majority opinion is *dicta*. The actual result in *Rappa*, invalidation of an ordinance that prohibited political advertising, *id.* at 1079, is consistent with the result in the instant case. The second case, *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) upheld two ordinances remarkably similar to Durham's that allowed noncommercial advertising to be substituted for permissible commercial advertising. The court specifically discussed *Discovery Network*, finding that it had not overruled *Metromedia*, and had not established a new test for protection of commercial speech. *Id.* at 610. Notwithstanding this conclusion, the court, because of the "principle enunciated in *Discovery Network*," interpreted the ordinances to allow noncommercial signage only for on-site signs, not for off-site billboards. *Id.* at 611. There is thus some inconsistency in judicial interpretation of the

Outdoor Systems ordinances and Durham's ordinance. Significantly, however, the court in *Outdoor Systems* did not hold that the ordinances at issue would be unconstitutional if interpreted like Durham's. It merely interpreted the ordinances to avoid a possible conflict with *Discovery Network*. The result thus does not directly conflict with this decision, certainly not to the degree that would warrant granting certiorari in this case.

In summary, no federal appellate court has invalidated a billboard ordinance because it does not restrict noncommercial billboards in an identical manner as commercial billboards. If the Supreme Court wishes to resolve some of the confusion that exists concerning *Metromedia*, granting certiorari in a case involving a sign ordinance which is arguably overinclusive and regulates too much noncommercial speech will accomplish this purpose. Granting certiorari in this case will not.

The lower court's decision also does not conflict with this court's decision in *Discovery Network*. *Discovery Network* did not, as Naegele interprets, establish new protections for commercial speech or inaugurate an era in which ordinances which distinguish between commercial and noncommercial billboards are presumed to be unconstitutional. In fact, the majority specifically declined, 113 S. Ct. at 1510 & n.11, over the sole objection of Justice Blackmun, *id.* at 1517, 1521, to adopt the more protective test for commercial speech that the court of appeals had adopted. Rather, the majority applied the same commercial speech test, first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), that the court applied in *Metromedia* in concluding that commercial off-premise billboards could be banned. *Discovery Network*, 113 S. Ct. at 1510. Application of that test led to invalidation of Cincinnati's newsrack ordinance because there was no fit between Cincinnati's goals and the regulation of only 62 newsracks. *Id.*

The court in *Discovery Network* invalidated an ordinance that regulated only 62 newsracks dispensing "commercial" publications out of a total of 1,500 to 2,000 offending newsracks. *Id.* Applying the four-part *Central Hudson* test as revised in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), the court concluded that in light of the history of the ordinance and the "paltry" and "minute" impact of regulating such a small number of newsracks there was not a "reasonable fit" between the challenged ordinance and the city's safety and aesthetics goals. 113 S. Ct. at 1510. The court explicitly cautioned that

> Our holding, however, is narrow . . . [W]e do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing.

Id. at 1516.

If applied to billboards[3] the decision should not be interpreted expansively, or the result will certainly be the Hobson's choice described by Chief Justice Rehnquist in his cogent dissent, in which Justices White and Thomas joined: communities would either prohibit all speech, both commercial and noncommercial, or give up, and not regulate at all. *Id.* at 1525 (Rehnquist, C.J., dissenting).

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[3] It is debatable whether *Discovery Network* should be applied to billboards at all, given this Court's admonitions that "each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses, and dangers for each method." *Metromedia*, 453 U.S. at 501, *quoting Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Billboards are a distinctly different medium than other speech, as the court recognized in *Metromedia*, 453 U.S. at 501. The "secondary effects" of billboards, in particular the forced visual intrusion on highway users and highway safety hazards they present, do not exist for newspapers and other print media.

The Court's recent holding in *City of Ladue v. Gilleo, supra*, indicates that *Discovery Network* should not be read as Naegele suggests. In *Gilleo*, the court did not consider the challenged ordinance to be presumptively unconstitutional even though there were content-based exemptions in the ordinance that favored certain types of signs. 114 S. Ct. at 2044. Rather, it assumed that the ordinance was viewpoint-neutral and analyzed it accordingly. *Id.* In holding that the City of Ladue could not prohibit residential political signs, the court specifically noted that its holding did not encompass residential signs of other types, such as off-site commercial signs. *Id.* at n.17. *Gilleo* confirms that the Court recognizes the importance of offering special protection to noncommercial speech, consistent with the opinion of the plurality in *Metromedi*a, 453 U.S. at 511-515.

Assuming, *arguendo*, that *Discovery Network* applies to billboards, then it is reasonably interpreted to require that the "fit" be shown that was not present in that case. In this case, the lower courts have found such a fit. Pet. App. 40a, 44a, 49a-51a. In addition, if, *arguendo*, *Discovery Network* imposes a new requirement that a neutral justification be shown for regulating just commercial billboards, that justification exists here. In *Discovery Network* Cincinnati presented a "weak" justification, rejected by both lower courts, that commercial newsracks could be distinguished from noncommercial newsracks because they proliferated. 113 S. Ct. at 1514-1515, 1517. In contrast, in this case the district court in 1987 found that the City's argument that commercial billboards had proliferated, and were in fact, the problem, was supported by evidence that noncommercial advertising could not support the continued maintenance of billboards by Naegele. Pet. App. 40a, 49a-51a. In other words, Durham's argument concerning proliferation has been examined, and accepted. The district court's conclusion in 1987 has since been buttressed by stipulations showing that noncommercial use of billboards is infre-

quent and incidental, comprising only 2% of Naegele's advertising, and by Naegele's stipulation that it cannot support its business through noncommercial advertising. Pet. App. 11a; C.A. App. 24-25, 38, 89. The "fit" that was lacking in *Discovery Network* is clearly present here and has already been analyzed by the courts below.

Even if Naegele is correct that *Metromedia* and *Discovery Network* need reconciliation, the factual record below prevents this case from being an appropriate vehicle to provide it. The court's First Amendment decisions are generally narrow and fact-specific, and a well-developed factual record is important. This is true especially for review of sign regulations, given the complexity of typical municipal sign codes. In this case, however, the record on First Amendment issues contains no factual stipulations or evidence concerning application of the ordinance. It is also not current since the decision on the First Amendment issue was issued in 1988, and discovery on that issue completed in 1986. Since then two comprehensive revisions of the sign code were passed in 1988 and 1994.[4] Both carry forward the commercial/noncommercial distinction in the 1984 code, but clarify certain definitions, restrictions applicable to noncommercial signs, and administrative appeal routes. Assuming, *arguendo*, that Naegele's characterization of the unresolved issues in this case is accurate, clearly a case involving a sign code unaltered by subsequent amendments, with either adequate factual stipulations or evidence of its application, would be a more appropriate vehicle for consideration.

Finally, this case should not be remanded to the Fourth Circuit for reconsideration under *Discovery Network*, as Petitioner suggests. As noted, *Discovery Network* did not establish a new test to be applied to restrictions on commercial speech, but was merely an application expressly limited to the facts of that case of the same commercial

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[4] The 1988 revision is reprinted at Pet. App. 62a-91a. However, this code was not the subject of the lower courts' analyses in 1987 and 1988. The 1994 code is not a part of this record.

speech test that existed when this case was first decided. The lower courts in this case, before *Discovery Network* was decided, analyzed the "fit" that was deemed lacking in that case, and determined that such fit was present. Naegele presented thorough arguments concerning the application of *Discovery Network* to the court of appeals in three motions and a petition for reconsideration, and called the court's attention in oral argument to the case. At the time of its decision on the taking issue in 1993, the court of appeals was clearly aware of *Discovery Network*, but did not consider that it would change the outcome of its 1988 decision. Remanding this case for the court of appeals to merely repeat the analysis already conducted by the district court in 1987 will extend Naegle's immunity from compliance with the ordinance beyond the four additional years it has already had, unnecessarily prolong this endless litigation, and further increase its astronomical costs.

II. THE COURT'S CONCLUSION THAT THE AMORTIZATION PERIOD WAS REASONABLE, WHICH WAS DETERMINED WITHOUT UTILIZING THE UNIT OF PROPERTY NAEGELE CONTESTS, INDEPENDENTLY SUPPORTS THE HOLDING BELOW THAT THERE WAS NO TAKING

Petitioner complains that the court erroneously assessed the economic impact of the ordinance on a "unit" consisting of all of its signs in the Durham market area, rather than just the billboards and leaseholds subject to amortization, and that this determination fixed the outcome of the case. Petitioner is wrong. The district court conducted two analyses of economic impact and concluded the ordinance was not an unconstitutional taking based on two grounds: (1) because it contained an amortization period which the court determined was reasonable in light of the nature and extent of Petitioner's property interests in its individual billboards and associated leases, and the economic benefit the amortization period afforded Petitioner, Pet. App. 16a-20a; and (2) because the impact

on Petitioner's business unit at the end of the amortization period was not severe, in light of Petitioner's other sign holdings. Pet. App. 18a. For the first holding, without ever acknowledging it was doing so, the court used as a unit just the disputed billboards and leaseholds, and conducted one of the most thorough and detailed evaluations of the facts concerning these billboards and leaseholds to be found in a reported billboard amortization case. Pet. App. 11a-13a, 16a-20a.[5] For the second holding, the district court used as a unit the billboards in the Durham metro area, the unit that Petitioner now contests. Pet. App. 7a-10a. Unfortunately this unit received all of the court's analysis on the unit issue, *id.*, which gives it a significance unwarranted by the law. In fact, under well-established amortization precedent the first ground alone was sufficient to support the finding that there was no taking. Naegele essentially concedes this in its petition, recognizing that this Court must review the constitutionality of amortization in order to address the lower court's conclusion that there was no taking. Pet. 26-28.

The district court's dual analysis reflects the confused analytical approach used by the Court of Appeals in its remand in 1988 of the taking issue. The court accepted that an amortization period avoids a taking if it offers

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[5] Some confusion might exist from the heading "Relevant Aspects of Naegele's Business" which appears at the beginning of the court's discussion of the court of appeal's suggested factual inquiries. However, it is clear from the fact that the district court repeatedly referred to the "disputed signs" in the discussion that the cost, income, depreciation, and lease information being analyzed was that of just the disputed signs, i.e., those subject to amortization. The court did, for ease of discussion, aggregate the data for the disputed signs and leaseholds. However, the stipulated facts in the record below show cost, income, and lease history for each billboard and leasehold, and demonstrate that there is not a significant variation between the aggregate data for the disputed signs and leaseholds and the individual data for each sign and leasehold. C.A. App. 74-156.

the owner a chance to recoup his investment and avoid substantial loss. Pet. App. 27a. However, the court also appeared to accept Petitioner's theory that loss to its integrated business calculated at the *end* of the amortization period was relevant to the takings analysis. Pet. App. 28a-29a, 32a. This theory grew in large part from Petitioner's complaint that because of its method of marketing billboards, billboards that were part of its business unit but that were not subject to removal under the Durham ordinance would also be severely damaged by the ordinance. Pet. App. 28a. In fact, however, an analysis of economic impact that focuses on the *end* of the amortization period is neither consistent with the theory of amortization, nor with its implementation by the courts over the last fifty years.

The termination of certain types of existing uses and structures through amortization is a long-standing and widely accepted approach in zoning. It is a common solution to one of the most challenging problems in twentieth century zoning—how to eliminate uses that do not conform to current zoning requirements, which after becoming nonconformities, enjoy a competitive advantage and thus generally do not fade away.[6] An amortization ordi-

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[6] The continuing existence of structures and uses that are no longer legal is considered by many land use scholars to be the "greatest obstacle to . . . orderly development" in many communities. Reynolds, *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and Public Welfare*, 34 J. Urban and Contemp. L. 99, 100 (1988). These nonconformities prosper because of the monopoly position they enjoy as a result of the change in zoning. Comment, *The Abatement of Pre-Existing Uses Under Zoning Laws: Amortization*, 57 NW. U.L. Rev. 323 (1962). Courts have also recognized this problem. *See, e.g., City of University Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972), *appeal dismissed*, 411 U.S. 901 (1973) (upholding amortization to terminate nonconforming commercial use in residential zone); *Grant v. Mayor and City Council of Baltimore*, 129 A.2d 363, 365 (Md. 1957) (upholding five year amortization of nonconforming billboards.)

nance prohibits new uses of a given type on the date of enactment but allows existing uses to continue for a grace, or "amortization" period. This period allows the owner of the existing use to enjoy a favorable competitive position, continue to earn revenues from the now-nonconforming use, make new plans, and try to conform with the new restrictions, if conformity can be achieved. Courts have generally concluded that this approach strikes a balance between property owners' rights and the community's welfare as furthered by zoning. *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 261 (N.Y. 1977), *app. dismissed*, 439 U.S. 809 (1978).

The vast majority of state courts and all federal appellate courts,[7] that have addressed the constitutionality of amortization have upheld it. *See* 1 Robert M. Anderson, *American Law of Zoning 3d* §§ 6.69-6.73; 4 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 51B.05[2] & [4]; 4A Norman Williams, Jr., *American Planning Law* (1986) §§ 116.01-116.06; Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R. 5th 391 §§ 2[a], 3[a]. In particular, the courts have recognized the validity of amortizing uses such as billboards and "open air" uses of land such as junk yards and material storage facilities. *Anderson, supra*, § 6.74; *Rathkopf, supra*, § 51.B.05[6] at 51B-62; 1 *Rathkopf, supra*, § 14A.04[4]; *Zitter, supra*, §§ 2[a], 5. These uses involve relatively small capital investments in structures or other permanent changes to the face of the land.

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[7] *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987) (upholding 5½ year amortization of billboards); *Art Neon Co. v. City and County*, 488 F.2d 118 (10th Cir. 1973) (upholding 5 year amortization of billboards); *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 114 (5th Cir.), *cert. denied*, 400 U.S. 805 (1970) (upholding 5 year amortization of billboards); *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950) (upholding 10 year amortization of gasoline station).

The small minority of state court decisions cited by Naegele that have rejected the principle of amortization were based on interpretations of state constitutions that were held to create vested rights in owners of existing uses.[8] *See Williams, supra,* § 116.06 at 264-268. This divergence is consistent with this court's rule that property rights are defined, and limited, by state law. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2901 (1992); *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Clearly, the extent to which an owner of a use has a vested right to continue that use is a function of state law, and North Carolina has held that such a right is subject to amortization, if the period is reasonable. *State v. Joyner,* 211 S.E.2d 320 (N.C. 1975), *appeal dismissed,* 422 U.S. 1002 (1975); *Summey Outdoor Advertising, Inc. v. County of Henderson,* 386 S.E.2d 439 (N.C. App. 1989), *disc. rev. denied,* 392 S.E.2d 101 (N.C. 1990) (5 year amortization of advertising sign upheld); *County of Cumberland v. Eastern Federal Corp.,* 269 S.E.2d 672 (N.C. App. 1980), *disc. rev. denied,* 273 S.E.2d 453 (N.C. 1980) (3 year amortization of sign upheld).

The economic theory behind amortization focuses on the restoration of the property owner to his original position through allowing such owner to recoup the investment made in the now-prohibited use or structure. *Benners, supra,* 485 S.W.2d 773, 779 (Tex. 1972); *Grant, supra,* 129 A.2d at 369; *City of Los Angeles v.*

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[8] *Lamar Advertising of South Georgia, Inc. v. City of Albany,* 389 S.E.2d 216, 217 (Ga. 1990) (citing Georgia state constitution); *Ailes v. Decatur County Area Planning Comm'n,* 448 N.E.2d 1057, 1059 (Ind. 1983) (unconstitutional, citing prior state case law); *Hoffman v. Kinealy,* 389 S.W.2d 745, 748 (Mo. 1965) citing Missouri state constitution); *Loundsbury v. City of Keene,* 453 A.2d 1278, 1280 (N.H. 1982) (citing New Hampshire state constitution); *Pennsylvania Northwestern Distribs., Inc. v. Zoning Hearing Board,* 584 A.2d 1372, 1375 (Pa. 1991) (citing Pennsylvania state constitution).

Gage, 274 P.2d 34, 43 (Cal. Ct. App. 1954). Thus, most courts have used recoupment or near-recoupment of the original cost of a use or structure as a benchmark for measuring the adequacy of a amortization period. "A court will almost certainly uphold an amortization ordinance if all factors indicate that the prescribed period is adequate for recovery of a substantial part of the investment."[9] Reynolds, *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 J. Urb. Contemp. L. 99, 121 (1988). *See also* Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 Stan. L. Rev. 1325 (1977). In billboard cases, in addition, the courts have also focused on lease terms to judge the sufficiency of an amortization scheme. *Modjeska, supra*, a leading billboard amortization decision, cited the importance of five factors in determining the reasonableness of an amortization period for billboards: initial capital investment, investment realization to date, life expectancy of the investment, whether obligations continue under the lease, and whether the lease is terminable. 373 N.E.2d 255, 262. This approach has ben followed in numerous billboard amortization decisions.[10]

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[9] In emphasizing "recoupment of investment," courts have rejected the proposition that the amortization period must recoup the fair market value of the signs. *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 942 (Tex. Civ. App. 1978), *cert. denied*, 444 U.S. 833 (1979) (the focus on initial capital investment "necessarily precludes recoupment or removery of the market value"). Nor have they required that the signs have no value at the end of the amortization period. *Art Neon Co. v. City and County of Denver*, 488 F.2d 118, 121 (10th Cir. 1978).

[10] *See, e.g., Suffolk Outdoor Advertising Co., Inc. v. Town of Southhampton*, 45 N.E.2d 1245, 1247-48 (N.Y. 1983) (3 year amortization period upheld where sign owners had fully recouped their investments, substantially depreciated their billboards for income tax purposes, had relatively insubstantial lease obligations, and,

Using standards such as recoupment of investment, lease terms, and rate of depreciation claimed under tax law, courts have upheld the overwhelming majority of ordinances amortizing billboards. 1 *Rathkopf, supra*, § 14A.04[4]; 4 *Rathkopf, supra*, § 51.B05[6]; *Zitter, supra*. § 5. Most of these ordinances contained amortization periods shorter than Durham's.[11]

These decisions are consistent with Supreme Court precedent holding that trade or business uses can be terminated even without provision of an amortization period. The cases clearly recognize that *land* must enjoy permanent economic viability. *Lucas*, 112 S. Ct. at n.13; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 495 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In contrast, however, the Court has not accorded the same protection to lesser property interests, and has repeatedly upheld state and local regulations that, without grace periods, destroyed the usefulness of business-related property. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding termination of quarry); *St. Louis Poster Advertising Co. v. St.*

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thus, would not incur any substantial financial loss); *Lubbock Poster Co., supra*, 569 S.W.2d 935, 941-42 (recoupment of investment is the major consideration in determining whether there is a taking and the court should look at the five *Modjeska* factors, plus removal cost. Compare the less factually complicated approach in *State of Maine v. National Advertising Co.*, 409 A.2d 1277, 1289 (Me. 1979) in which the removal of 260 billboards statewide through amortization was upheld because the owners offered no evidence that the amortization period was inadequate to recoup their investment.

[11] *Major Media of the Southeast, Inc. v. City of Raleigh, supra* (five and one-half years); *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970), *cert. denied*, 400 U.S. 805 (1970) (five years); *Donrey Communications Co. v. City of Fayetteville*, 660 S.W.2d 900 (Ark. 1983) (four years); *Mayor and Council of New Castle v. Rollins Outdoor Advertising, Inc.*, 475 A.2d 355 (Del. 1984) (three years); *State v. Sanguinetti*, 449 A.2d 922 (Vt. 1982) (five years). *See generally* Comment, *Amortization: A Constitutional Means to Eliminate Nonconforming Municipal Signs*, 54 Ore. L. Rev. 224 (1975).

Louis, 249 U.S. 269 (1918) (upholding ordinance that destroyed usefulness of pre-existing contracts for billboards and billboard faces); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (upholding termination of existing brick-making operation); *Mugler v. Kansas,* 123 U.S. 623 (1887) (upholding destruction of brewery, related machinery and business property).

Recent decisions have affirmed the continuing viability of the holdings in these cases that elimination of a single use will not effect a taking. *Penn Central,* 438 U.S. at 125-127. They also have clarified that the decisions are not limited to situations in which government is eliminating a "noxious" use, but rather, extend to all proper uses of the police power. *Penn Central,* 438 U.S. at 133-34, n.30; *Lucas,* 112 S. Ct. at 2896-99.

In *Lucas* this court emphasized that an owner of personal property used for commercial purposes can have only limited expectations that the property will have indefinite economic use:

> [A] property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1992) at 413. . . . And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see *Andrus v. Allard,* 444 U.S. 51 (1979).

112 S. Ct. at 2899. This restriction is clearly applicable to billboards, which have only one economically productive use, and which are unique in their parasitic relationship to the publicly-created road. Thus, opinions that have closely analyzed the property interests of billboard

owners have concluded that the interests exist entirely at the sufferance of government, and may be subject to termination without any amortization at all.[12]

In demonstrating that it was legally unnecessary for the court to determine the impact of the ordinance on Naegele's single-use interests at the end of the amortization period, the City does not concede that the court's unit of property determination was incorrect. It was merely irrelevant. However if this Court were to determine otherwise, then there is ample support for the court's method of determining the unit. Moreover, whether right or wrong, the unit determination does not meet this Court's standards for granting review.

Naegele's argument that, because North Carolina law recognizes leases and billboard structures as "property," they must be treated as individual units of property in a taking analysis misses the mark. The issue is not whether individual properties exist, but whether they should be considered separately or together for purposes of assessing economic impact in a taking claim.

The aggregation of legally distinct and sometimes physically separate properties in a single unit based on unity of use for analysis of economic impact is employed in both eminent domain cases, and regulatory taking cases. In eminent domain cases, such combination is based on the accepted principle that properties with an integrated use

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[12] In *Micalite Sign Corp. v. State Highway Department*, the Vermont Supreme Court upheld the right to remove, without any amortization period, a pre-existing sign because billboard owners were using the view from highways for commercial purposes for direct profit, similar to common carriers, and were allowed that use only as a matter of sufferance by the legislature. 236 A.2d 680, 682 (Vt. 1967), *citing Kelbro v. Myrick*, 30 A.2d 527, 531 (Vt. 1943). *See New York State Thruway Authority v. Ashely Motor Court, Inc.*, 176 N.E.2d 566, *remitter amd.*, 178 N.E.2d 232 (N.Y. 1961); *General Outdoor Advertising Co. v. Dep't of Public Works*, 193 N.E. 799, 808 (Mass. 1935), *appeal dismissed sub nom. General Outdoor Advertising Co. v. Callahan*, 296 U.S. 543 (1935), 297 U.S. 725 (1936). *See also Williams, supra*, § 119.04, § 121.06, § 121.07.

may be treated as a whole. *See, e.g., Georgia-Pacific Corp. v. United States,* 640 F.2d 328 (Ct. Cl. 1980), *United States v. Honolulu Plantation Company,* 182 F.2d 172 (9th Cir. 1950), *Baetjer v. United States,* 143 F.2d 391 (1st Cir. 1944). Eminent domain cases in North Carolina hold that three factors—unity of ownership, physical unity, and unity of use—are considered in determining a unit, with unity of use being given greatest emphasis. *Barnes v. State Highway Comm'n,* 109 S.E.2d 219 (N.C. 1959). Regulatory taking cases have also given unity of use great weight. *See, e.g., Ciampitti v.* U.S., 22 Ct. Cl. 310 (1991) (separate, noncontiguous parcels acquired over different times, some of which had already been conveyed to other owners at the time of suit, treated as single unit); *Deltona Corp. v. U.S.,* 657 F.2d 1184 (Ct. Cl. 1981) (5 separate subdivisions combined into a single unit on basis of landowner's unified planning and integrated development scheme); *Jentgen v. U.S.,* 657 F.2d 1210 (Ct. Cl. 1981) (80 acres of undevelopeable wetlands combined with 20 buildable acres over which the Corps had no jurisdiction for the unit). In these decisions, like the instant decision, defining the unit was an intensely fact-based determination, based on particular considerations of the history and use of the property at issue. *See* Pet. App. 9a, n.4.

Supreme Court precedent supports that property will not necessarily be considered as the affected unit just because it is recognized as property. Thus the court in three cases has aggregated property that state law recognized as legal "property" with other property for analysis. *Keystone, supra,* 480 U.S. at 478, 500, n.28 (aggregation of support estate with mineral estate); *Penn Central, supra,* 438 U.S. at 141 (aggregation of lessee UGB's lease with parcel as a whole, and of air rights with remainder of property, for analysis); and *Goldblatt, supra,* 469 U.S. at 593-94 (combining lessee's interest with that of owner of fee parcel for analysis.)

Granting certiorari in this case will offer little guidance in other cases. Because billboards are a unique

type of property, any principles derived from review of this case would not apply to other properties. Finally, denying certiorari will not open the flood gates for courts to find "super-units" in other taking cases. Since 1988 no other court has used the court of appeals' decision as a basis for combining other properties that were not billboards into integrated units, undoubtedly because of the largely fact-based nature of the unit-of-property determination.

In partial sum, then, whether right or wrong, the district court's unit determination was not necessary to the outcome of this case, which is independently supported by the court's analysis of the reasonableness of the amortization period. Even if, arguably, the unit determination were necessary, it is supported by precedent and does not conflict with decisions of this court, or of other appellate courts. Thus, granting certiorari will not offer guidance in an area that has split the courts. Nor, given the unique nature of billboards, and the fact-bound nature of the unit of property determination will review of this case help to establish useful parameters for the "unit of property" analysis to be employed in cases involving more typical property interests.

III. THE COURT CANNOT REACH THE ULTIMATE TAKING ISSUE NAEGELE POSES BECAUSE OF THE ABSENCE OF CRITICAL FACTS

The question Petitioner has formulated on the taking issue assumes that there is a factual finding that the billboards are valueless at the end of the amortization period. However, the district court's conclusion that the billboards are valueless is based on the parties' stipulations. The parties expressly limited the use of certain critical factual stipulations, including those pertaining to whether the affected billboards were valueless at the end of the amortization period, to the issues presented in the parties' respective motions for summary judgment. Petitioner did not move for summary judgment on the taking issue, but only on the unit issue and thus if used in favor of Peti-

tioner the stipulations as to valuelessness can be used only for deciding the unit issue.

The factual stipulations on which the district court based its grant of summary judgment consist of two parts: Part A, facts stipulated for all purposes, and Part B, facts stipulated only for purposes of the parties' respective motions for summary judgment. Pet. App. 8a, n.2. The Part B stipulations include various stipulations that Naegele cannot practically re-use its amortized billboards in other locations. C.A. App. 89. The City agreed to these stipulations, despite evidence that the billboards could be re-used, because of the express restriction that the Part B stipulations could be used only for the parties' respective motions for summary judgment. The stipulations regarding value at the end of the amortization period were thus available for consideration against the City on the City's motion that there was no taking, but were not available for consideration in Petitioner's favor on whether there was a taking since the Petitioner had not requested summary judgment on this issue. This court is similarly limited in its use of these stipulations, and thus the "ultimate issue" that the ordinance is a taking presented by Petitioner in its second question cannot be decided on the basis of the factual record before the court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NAEGELE OUTDOOR ADVERTISING, INC.,
PETITIONER,

v.

CITY OF DURHAM,
RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

In arguing against review of the decision below, Durham does not take issue with many of the propositions advanced in the petition for a writ of certiorari. The City does not deny that the issues presented here are important and recurring ones. Nor does it deny that the courts of appeals are in disarray on the nature of the First Amendment rules governing outdoor advertising. Moreover, Durham makes only the most halfhearted attempt to defend the merits of the court of appeals' Fifth Amendment holding. And for the reasons explained below, the arguments that the City does advance against review are insubstantial.

A. The First Amendment Issue in This Case Warrants Review

1. Durham acknowledges that this Court's decision in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) "produced a confusing welter of opinions" and that "lower court decisions under *Metromedia* * * * have not been uniform." Br. in Opp. 9. The City insists, however, that the courts of appeals have disagreed only in their analysis of the sorts of restrictions that may be imposed on *noncommercial* speech. *Id.* at 9-12. This assertion is wrong.

We explained in the petition (at 12-13) that, for example, the decision below cannot be reconciled with the Third Circuit's holding in *Rappa* v. *New Castle County*, 18 F.3d 1043 (3d Cir. 1994), which adopted a rule — applicable to noncommercial as well as commercial signs — requiring that content-based exceptions to a general ban on signs be "significantly related to the particular [geographical] area in which the sign is viewed — for example, a sign identifying the property on which it sits." *Id.* at 13. Durham attempts to distinguish *Rappa* on the ground that "[t]he actual result in *Rappa*, invalidation of an ordinance that prohibited political advertising, * * * is consistent with the result in the instant case." Br. in Opp. 12. But this argument entirely ignores the Third Circuit's reasoning in *Rappa*, which turned on the conclusion that content discrimination in the regulation of signs may be justified only "when there is a significant relationship between the content of particular speech and a specific location or its use." 18 F.3d at 1065.[1] The Third Circuit was quite explicit in concluding that

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[1] In addition, Durham's description of the "actual result" in *Rappa* as simple invalidation of "an ordinance that prohibited political advertising" is incorrect. In fact, the statute at issue in *Rappa* was very similar to the Durham Ordinance, banning *all* signs except those that fell within seven stated exceptions — some permitting specified forms of commercial and some permitting specified forms of noncommercial speech. See 18 F.3d at 1066-1068. Compare Pet. App. 63a-67a (Durham Ordinance). The Third Circuit assessed the constitutionality of each of these exceptions (18 F.3d at 1066-1068) and held the ordinance *as a whole* unconstitutional because "at least one of the exceptions — the exception for signs advertising local cities, industries, and meetings — is for signs that are not

application of its rule has nothing to do with whether the speech at issue is commercial or noncommercial,[2] and Durham pointedly does *not* suggest that its Ordinance would satisfy the Third Circuit's test.

Similarly, Durham itself acknowledges that there is "some inconsistency" between the decision below and that of the Ninth Circuit in *Outdoor Systems, Inc.* v. *City of Mesa*, 997 F.2d 604 (9th Cir. 1993). Br. in Opp. 12. In fact, the analysis of the Fourth and Ninth Circuits is irreconcilable. As we explained in the petition (at 16 n.11), the Ninth Circuit in *Outdoor Systems* upheld the sign codes challenged there only because "[t]he codes do not discriminate between commercial and noncommercial speech and thus do not run afoul of the principle enunciated in *Discovery Network*." 997 F.2d at 611. The Durham Ordinance, which

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significantly related to the specific location where the signs are placed or [their] use." *Id.* at 1068. See *id.* at 1079. It is undeniable that the general exception to the Durham sign ban for noncommercial signs fails the Third Circuit's test because it is "not significantly related to the specific location where the signs are placed"; application of the Third Circuit's approach therefore plainly would lead to invalidation of the Durham Ordinance.

[2] In explaining the application of its test the court provided both commercial and noncommercial illustrations, declaring:

> A sign that says "Speed Limit 55" or "Rest Stop" is more important *on a highway* than is a sign that says "Rappa for Congress." A sign identifying a commercial establishment is more important on its premises than is a sign advertising a related project. If the former signs are banned from the highway or the place of business, there is no other means of communication that can provide equivalent information. In contrast, placing a sign that says "Rappa for Congress" or "Drink Pepsi" on a highway, while it might be an important means of communication because of the number of travellers on the highway, has no relationship to the property on which it is placed or to the fact that it is next to a highway. Banning these signs potentially leaves many alternative means of communicating the same information.

18 F.3d at 1064 (emphasis in original) (footnote omitted).

explicitly *does* discriminate between commercial and noncommercial speech, plainly could not survive application of the principle recognized in *Outdoor Systems* to be controlling.

2. In the petition, we also contended (at 13-15) that review of the First Amendment issue presented here is in order to resolve the clear tension between the plurality opinion in *Metromedia* (relied upon by the court below) and the Court's more recent decision in *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Durham does not deny that this tension exists or that it will be a source of enormous confusion for the lower courts, and it makes no attempt to reconcile the decisions.[3]

Durham does contend that the holding below may be reconciled with *Discovery Network*, arguing that, while there was no substantial justification for the Cincinnati regulation at issue in that case, there is a close fit between the City's means and ends here because its Ordinance will eliminate a substantial percentage of the off-premise signs in the City. Br. in Opp. 13-16. But even assuming that such a fit between means and ends would validate otherwise unconstitutional content-based discrimination, Durham is able to reach its conclusion only by artificially restricting the universe of signs to be examined for "fit" to those directly regulated by the Ordinance. In so doing, the City simply disregarded many other signs that give rise to precisely the sorts of esthetic and safety concerns that assertedly justify the Ordinance, including the many off-premise signs located along interstate and

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[3] Instead, Durham relies on *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038 (1994), for the proposition that "the Court recognizes the importance of offering special protection to noncommercial speech." Br. in Opp. 15. But if the City means by this that *City of Ladue* justifies discrimination between commercial and noncommercial speech, it is misreading that decision. While the Court there held that the First Amendment prohibited a municipal ban on certain political signs, it simply did not reach "the separate question whether it was improper for the City simultaneously to *permit* certain other signs." 114 S. Ct. at 2044 (emphasis in original). That, of course, is the question presented here. While the Court cited *Discovery Network* for the proposition that content discrimination is suspect (see *id.* at 2044), the Court had no occasion in *City of Ladue* to comment on the scope of the holding in *Discovery Network*.

federally aided highways, and the hundreds of distracting and obtrusive on-premise signs in the City. Durham's ban on commercial signs that "are no more harmful" than the highway and on-premise signs that are permitted — a ban that the City has not established will have anything more than "an inconsequential effect on the esthetic values with which the City is concerned" (*City Council of Los Angeles* v. *Vincent*, 466 U.S. 789, 812 (1984); see *Lindsey* v. *City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987)) — accordingly is "an insufficient justification for the discrimination." *Discovery Network*, 113 S. Ct. at 1511.[4] At a minimum, as we argue in the petition (at 17), the case should be remanded so that petitioner, after full briefing and argument, has an opportunity to have the Ordinance judged against the standards of *Discovery Network*; petitioner was not provided that opportunity by the court below.

B. The Takings Issue in This Case Warrants Review

1. In arguing against review of the takings issue presented in the petition, Durham recognizes that the decision of the court below to aggregate *all* of petitioner's billboards in the Durham metropolitan area into a larger unit for purposes of the takings inquiry is a highly questionable one which it delicately labels a "confused analytical approach." Br. in Opp. 18. But Durham insists that the decision below rested on two independent and

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[4] Durham is wrong in contending (Br. in Opp. 16) that the record is somehow inadequate for resolution of the First Amendment issue presented here. Our argument is a purely legal one: that the court below erred in holding that a sign regulation necessarily is constitutional so long as it does not discriminate against noncommercial speech. It therefore is not surprising that the City fails to point to point to any issue, relevant to the disposition of the case, that is not illuminated by the existing record. It may be added that, as the Court repeatedly has held, "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). See *Discovery Network*, 113 S. Ct. at 1510. If the City failed to introduce evidence that somehow would have established the constitutionality of its regulation, the Ordinance should be struck down; Durham's failure to carry its burden should not be rewarded with the denial of review.

alternative grounds: *first*, that petitioner's separate pieces of property could be aggregated into one unit; and *second*, that use of an "amortization period" justified the Ordinance because it permitted petitioner to recoup some of its investment. Because, on this hypothesis, the holding relating to the unit of property was unnecessary to the decision below, Durham contends that denial of review is justified. Br. in Opp. 17-19, 27.

This argument rests on a patent misreading of the decisions below. In its first opinion in this case, the court of appeals identified as a crucial, threshold issue "the designation of the appropriate unit of [petitioner's] property affected by the ordinance." Pet. App. 27a-28a. The court of appeals therefore directed the district court on remand to identify the proper unit of property, guided by the caveat that "[c]learly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone* [*Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987)], do not constitute a separate segment of property for taking purposes." Pet. App. 28a. It was this determination as to the unit of property that permitted the court of appeals to reject — without any reference to an amortization period — petitioner's argument that the Ordinance worked a taking by "deny[ing] [petitioner] all use of its property." "Instead," the court held, "like the statute upheld in *Keystone*, * * * [the Ordinance] directly affects only a part of the property." *Id.* at 31a.

The court of appeals went on to explain that the *next* step of the analysis

> is to determine whether the ordinance denies [petitioner] economically viable use of the appropriate unit of its property by considering the following factors identified in *Penn Central* [*Transportation Co.* v. *New York*, 438 U.S. 104, 124 (1978)]: (1) The "economic impact of the regulation on the claimant," (2) the "extent to which the regulation has interfered with distinct investment-backed expectations," (3) the "character of the governmental action."

Pet. App. 29a. The amortization period, the court concluded, comes into play only at the *end* of the analysis as "one of the facts that the district court should consider in defining the character of

governmental action, which is the third factor mentioned in *Penn Central*." *Id.* at 29a-30a.[5]

The district court faithfully applied this holding on remand. It began by ruling that the relevant unit of property was the set of all of petitioner's signs in the Durham metropolitan area, implementing the court of appeals' holding that the individual signs "'do not constitute a separate segment of property for taking purposes.'" Pet. App. 9a (citation omitted). The district court then made factual findings related to, among other things, the percentage of signs affected by the Ordinance compared to those remaining in petitioner's "business unit" and the "relative value of affected and remaining signs." Pet. App. 14a-15a.

Against this factual background, the court reasoned that "[t]he Durham ordinance must be evaluated in light of its impact on the entire set of [petitioner's] property interests. [Petitioner] retains the use of 126 of 232, or 54%, of its signs in the Durham metro market." Pet. App. 18a. As for the amortization period, the court indicated that it was simply one factor that "may be taken into account in considering the economic impact of the regulation." *Ibid.* But the existence of an amortization period was not regarded as a critical — and certainly not as an independently dispositive — factor by the courts below. To the contrary, the district court expressly acknowledged that the crucial determination in the case was the finding "that each individual sign does not constitute a separate unit of property. If it did, the *Lucas* inquiry into the nature of [petitioner's] title could be determinative." *Id.* at 21a n.7. The district court's holding, like that of the court of appeals, thus turned ultimately on the conclusion that a taking would not occur because the Ordinance would not deprive petitioner of "all

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[5] Durham maintains that review should be denied because "the final decision on the taking issue is merely an unpublished memorandum opinion." Br. in Opp. 9. But the holding of the court of appeals on the unit of property issue, which is quoted in text, was first stated in its initial, *published* opinion. As we explained in the petition (at 17), petitioner did not seek review of that decision at the time it was rendered because it was interlocutory.

economically viable use of its property interests *as a whole*." *Id.* at 20a-21a (emphasis added).

2. Durham's halfhearted attempt to defend the merits of the holding below regarding the unit of property is wholly unconvincing. The decisions of this Court cited by the City (at Br. in Opp. 26) stand only for the proposition that "'taking' jurisprudence does not divide a *single* parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130-131 (emphasis added). But as we explain in the petition (at 23-24), that principle provides no support for the astounding conclusion, reached by the courts below, that *separate* pieces of property may be combined into a single unit for purposes of the takings inquiry.[6]

3. In addition, Durham is wrong in asserting (Br. in Opp. 20-24) that use of an amortization period to vitiate a taking would be noncontroversial. To the contrary, adoption of that rationale would have important and profoundly disturbing implications for regulatory takings doctrine; to the extent that Durham is correct in its contention that the courts below relied on the existence of an amortization period in rejecting petitioner's takings argument, the City has not made out a case for denial of review. The City itself recognizes (*id.* at 21) that, as we explained in the petition (at 27), several courts have rejected the proposition that an amortization period may render noncompensable state action that otherwise would work a taking. And the City is incorrect in contending (Br. in Opp. 21 & n.8) that these decisions rested on state constitutions. The opinion in *Ailes* v. *Decatur County Area Planning Comm'n*, 448 N.E.2d 1057, 1059-1060 (Ind. 1983), makes no mention of the

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[6] The decisions of lower courts cited by Durham (Br. in Opp. 26) also are inapposite. They involve either arguments about the availability of so-called "severance damages" to property that has not been taken (see *Georgia-Pacific Corp.* v. *United States*, 640 F.2d 328, 337 (Ct. Cl. 1980); *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172 (9th Cir. 1950)), or takings of one (or more) of a set of contiguous parcels of land. See *Ciampitti* v. *United States*, 22 Ct. Cl. 310, 318 (1991); *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1192-1193 (Ct. Cl. 1981); *Jentgen* v. *United States*, 657 F.2d 1210, 1213-1214 (Ct. Cl. 1981).

Indiana Constitution and plainly was premised on federal law. While other decisions cited in the petition did involve state constitutional provisions that mirrored the Fifth Amendment, the state courts in those cases relied on this Court's takings jurisprudence in finding that takings had occurred. See *Lamar Advertising of South Georgia, Inc.* v. *City of Albany*, 389 S.E.2d 216, 217 & n.1 (Ga. 1990) (citing *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980), and *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987)); *Hoffman* v. *Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965) (en banc) (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922)).

By the same token, Durham is incorrect in asserting (Br. in Opp. 23-24) that its amortization theory may be reconciled with this Court's decisions. We explained in the petition (at 28) that the City's approach cannot be squared with this Court's reasoning in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); the City makes no response. Nor can reliance on an amortization period to vitiate a taking be reconciled with the "categorical" rule that a taking occurs when "regulation denies all economically beneficial or productive use" of property. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).[7]

4. Finally, Durham is wrong in its peculiar argument that the record here is inadequate for resolution of the takings issue because the stipulations on which the district court relied in making its factual findings were "available for consideration against the City on the City's motion that there was no taking, but were not available in Petitioner's favor on whether there was a taking since Petitioner had not requested summary judgment on this issue." Br. in Opp. 28. This contention is explicable only as a desperate attempt to generate uncertainty about the factual record because

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[7] Even if Durham is correct in its unlikely contention that the Takings Clause has nothing to say about regulations that "destroy[] the usefulness of business-related property" other than land (Br. in Opp. 23), that does the City no good here; the Ordinance renders economically useless both petitioner's leaseholds in real estate and its substantial physical structures on those leaseholds. See Pet. 6, 17.

Durham has so little to say about the law. But the argument is, on its own terms, nonsensical. The question before this Court is whether the City's motion for summary judgment on the takings issue was properly granted -- and Durham acknowledges that the stipulations in the record were available "for consideration against the City on the City's motion." In fact, the findings here are unusually detailed, making this case an especially suitable vehicle for resolving the question presented: whether a regulation that denies the owner *all* economically beneficial use of particular pieces of property may be held not to effect a merely taking because the owner also has other property that is devoted to a common or related use. That issue plainly warrants review.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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